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February 27, 2017

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

Re: CJAC Amicus Letter in Support of Review in *Lubin, et al. v. The Wackenhut Corporation*, S239254. CRC 8.500(g).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

IMPORTANCE OF ISSUES PRESENTED AND INTEREST OF AMICUS

The Civil Justice Association of California (CJAC) supports the petition for review in this case because it presents a propitious opportunity for the Court to provide uniformity of decision regarding two important issues[1] about employer liability to their employees for statutory meal and rest break violations — (1) the proper legal standard for class certification (and decertification) when employees contend their employer owes them damages for not providing required breaks; and (2) the meaning and application of *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1 (*Duran*) to the facts of this and similar cases.

These issues are of paramount importance to CJAC, a 40-year-old non-profit organization of businesses, professional associations and financial institutions. Our principal goal is to make laws that determine who gets paid, how much, and from whom when some claim that others have occasioned injury to them, more fair, efficient, uniform and certain. Toward these ends, CJAC participates regularly before the co-ordinate and co-equal branches of government, including as *amicus curiae* in this

[1] The petition raises four issues, but CJAC, in the interest of brevity and recognition of the ample analyses set forth in the Petition and by other supporting *amici* letter briefs urging review (*e.g.*, the February 3, 2017 letter from Employers Group, CalChamber and California Hospital Association, et al.) confine this letter to two issues.

Court on select questions of importance to our members. Pertinent to this case, for example, we filed *amicus* briefs in others that are central to the issues raised by the petition for review and plaintiffs' answer to it — *e.g.*, *Duran*, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*), and *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319.

"Certification" or "decertification," which lies at the heart of the issues raised here, is a critical event in federal and California state court class action litigation and implicates all of CJAC's core purposes — improving fairness, efficiency, economy and certainty in the law and legal proceedings. In fact, "proceedings to certification . . . have become the arena of vigorous litigation. . . [because] once class certification has been achieved, a large number of class actions are resolved by settlement." (Candace A. Blydenburgh, *Class Actions: a Look at Past, Present, and Future Trends* (2015) Aspatore, p. *1, 2*, 2015 WL 4967445. *See also* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail* (2003)78 *N.Y.U. L. REV.* 1357, 1360-63 (arguing that there are four different versions of the "class certification" blackmail thesis, one contends that blackmail occurs because of the undesirable expenses of litigation, while the other three posit that these settlements occur because of the consequences of trying the action (*i.e.*, bankrupting the defendant); and George L. Priest, *Class Warfare*, *WALL ST. J.*, May 5, 2003, at A14 ("[I]f a class can be certified that is massive enough, even defendants with a strong case can be bludgeoned into a huge payout.").)

THE TRIAL COURT'S DECERTIFICATION ORDER AND THE APPELLATE COURT'S REVERSAL

Significantly, the trial court here first certified the class in March 2010. Then, after further discovery and *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338 and *Brinker* were decided, the trial court reconsidered and a little more than two years later in a 24-page order, decertified the class. The trial court's order explains it did this because of the aforementioned "significant new case law," and evidence adduced showing "the practical difficulties of trying this class action involving over 13,000 employees holding very diverse positions have become more apparent since certification." (Petition, p. 7.)

One of these "practical difficulties" was increasing evidence that "individualized inquiries" would be necessary to determine whether Wackenhut provided on-duty meal periods, since "even at worksites that typically had on-duty meal periods, some class members were actually authorized to take off-duty meal periods. (*Id.*) This particular problem was recognized and dealt with by *Brinker*, which held that employers need only provide meal breaks, not police them, thereby "triggering the need for an individualized inquiry for most meal and rest break claims . . . ." (Robyn Ridler Aoyagi & Christopher

J Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn't Good for Anyone*, *BENDER'S CALIFORNIA LABOR & EMPLOYMENT BULLETIN*, No. 7 July 1, 2013.) "The more individualized inquiries there are, the lower the chance of class certification because common issues of law or fact will not predominate over individual issues–an important factor in the class action 'community of interest' prong." (Matthew Goodman (Comment), *The Private Attorney General Act: How to Manage the Unmanageable* (2016) 56 *SANTA CLARA L. REV.* 413, 425.)

Another "difficulty" the trial court found was that even if Wackenhut provided only on-duty meal periods, whether they were allowed under the "nature of work exception" could not be determined on a classwide basis because there was "substantial evidence" showing profound differences among the various worksites and the nature of the work performed by [Wackenhut's] security officers." (210 Cal.Rptr.3d 215, 227-228.)

The trial court denied plaintiffs' proposal to replace individualized analysis of each class member's on-duty meal period agreement with statistical sampling and extrapolation, explaining that approach would "violate Wackenhut's due process right to 'present every available defense'" and "impermissibly alter the substantive law." (*Id.*) Finally, in regard to the rest break claim, the trial court found the evidence "show[ed] that class members at many Wackenhut worksites were provided with rest periods that lacked any restrictions and appeared to be fully off-duty." (*Id.*) Accordingly, the question "whether any restrictions placed on rest periods made them on-duty would require *unmanageable individualized* inquiries in the nature of the rest periods for each distinct worksite, shift, and security officer position." (*Id.*; italics added)

Four years later, the court of appeal reversed the trial court's decertification order, stating that despite evidence disproving plaintiffs' contention that Wackenhut had uniform, companywide policies to deny its employees off-duty meal and rest breaks, that evidence was beside the point because "whether a specific employee actually had a valid meal break on a given day is a *question of damages*, and does not preclude class certification." (210 Cal.Rptr.3d at 239; italics added.) Similarly, the appellate opinion discounted "anecdotal evidence that some employees had valid off-duty rest breaks does not preclude class certification; rather, it is evidence that is relevant to damages." (Opn. at 44.)

REASONS WARRANTING REVIEW

1. This court should decide whether the decision to certify or decertify a class should primarily be based on evidence about the comparative number of individualized determinations of liability versus common issues to the class, or on the analytical susceptibility of plaintiffs' "theories" of liability to common proof.

The appellate opinion "cherry picked" from a body of conflicting opinions about whether and when to certify a class action, choosing only those that emphasize the importance of "theory" over "facts" (as shown by the "evidence") in making that determination. This "theory" versus "fact" conflict in appellate authority is evident from the opinion's identification of what it sees as the trial court's transgression: "[R]ather than focusing on whether plaintiff's *theory* of liability *as described in their complaint* . . . was susceptible to common proof, the [trial court] focused [instead] on whether *individualized inquiries* would be required to determine whether in practice, officers ever received an off-duty meal period." (210 Cal.Rptr.3d at 226; italics added.)

Immediately following this observation is the parenthetical citation: "See *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701," with a bracketed summary of that opinion's holding in language echoing what the just-quoted portion of the appellate opinion describes as the trial court's reversible error. Indeed, lest a reader miss the point, the opinion mentions the importance of a complaint's "theory" to class action determinations 16 times. Thus, the appellate opinion stands for the proposition that "evidence" numerous employees received off-duty meal-breaks in practice, and accordingly were not members of the class to whom petitioner could owe liability, should be subordinated to plaintiffs' "theory" that they somehow (perhaps theoretically) on the way to judgment might be able to prove liability by common evidence.

But this approach to class certification or decertification is at odds with another line of authority buttressed by what those who judicially manage complex litigation readily acknowledge:

> [I]in motions to certify [or decertify] a class . . . everything happens at once: the *evidence* is presented; it must be admissible, or objections must be correct; the class definition must cohere with liability theories; and ascertainability must be demonstrated. The choice of liability theories will affect the adequacy of the class definition, and both will affect the decision of *what evidence to submit*. These factors will likely determine whether the common issues predominate over individual issues, a central inquiry in this type of motion. The balance here must be just right, for the case is probably over if the court denies the certification motion. We even have a nice term for it: death knell.

(Curtis E.A. Karnow, *Complexity in Litigation: a Differential Diagnosis* (2015) 18 *U. PA. J. BUS. L.* 1, 27; italics added.)[2] In short, theories of liability, class definitions and *evidence* must all come together at the certification stage and show, for certification to be ordered, that "common issues predominate over individual issues." (*Id.*) The importance of *common evidence* over pleading theories of liability for certification decisions in modern class actions cannot be gainsaid:

> The existence of common "questions" does not form the crux of the class certification inquiry . . .. *Any competently crafted class complaint literally raises common "questions.*" What matters to class certification, however, is not the raising of common "questions" – even in droves – but, rather, the *capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.*

(Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof* (2009) 84 N.Y.U. L. Rev. 97, 131-32; italics added.).[3] This is what is meant by, and what the trial court and appellate opinion here refer to as "manageabilty." (210 Cal.Rptr.3d at 220.)

The concept of "manageability" is firmly rooted in California case law. (*See, e.g.*, *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381.) It was first recognized in *Diamond v. General Motors Corp.* (1971) 20 Cal.App.3d 374, 377-78, where class certification was denied because the proceeding would be "unmanageable" due to many individualized issues. Shortly after, *Devidian v. Automotive Service Dealers Assn.* (1973) 35 Cal.App.3d 978, 985, dismissed a class action as "unmanageable" when the community of interest requirement was not met. As one recent legal commentary states:

> Manageability has often been subsumed in the predominance class action requirement, which requires that common issues of fact and law predominate over individual issues. Manageability can also be a consideration in other elements as well. Unmanageability "may be reflected by such matters as the size or contentiousness of the class . . . or the presence of special individual issues." If enough evidence of

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[2] The author is a judge of the Superior Court, County of San Francisco, who frequently presides over complex class action litigation.

[3] This division of authority about the importance of "evidence" versus "theory" in class certification decisions also exists in federal courts. "The ease of class certification . . . frequently turns on the *nature of evidence* and the *contours of the underlying claim*, and even at the federal appellate level courts disagree as to the threshold level of evidence necessary to allow a class action case to go forward. (Adam J. Sulkowski & Kent Greenfield, A *Bridle, a Prod, and a Big Stick: an Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior* (2005) 79 *ST. JOHN'S L. REV.* 929, 933-934; italics added.)

> unmanageability is found, the court denies class certification because going forward with the claim would transform the litigation into an enormous burden on the court's resources, unable to be effectively managed or controlled.

(Goodman, *supra*, 56 *SANTA CLARA L. REV.* at 430; citations omitted.)

"Manageability" necessarily requires a weighing and consideration of the *evidence* to determine if individual issues of *liability* are sufficiently numerous or complex to make class certification "unmanageable." The appellate opinion and plaintiffs seek to get around this uncomfortable reality by ignoring authority to the contrary or claiming it is not pertinent because any predominantly individual issues based on evidence relate to damages, not liability. Neither ploy works.

The opposed line of authority instructs, contrary to the opinion and plaintiffs' answer to the Petition, that a decision to certify or decertify a class should be evidence based and, if certification is to be conferred, that evidence must show the *existence* and *uniformity* of an employer's unlawful practice. (*See*, *e.g.*, *Cruz v. Sun World Internet, LLC* (2015) 253 Cal.App.4th 367, 388 ["evidence of a uniform policy or practice, not just an allegation, is necessary in order to certify the class."]; *Koval v. Pacific Bell Telephone Co.* (2014) 232 Cal.App.4th 1050, 1060 [because employer's meal and rest break policies and practices were "far from uniform," and subject to the "shifting kaleidoscope of liability determinations," case was "unsuitable for class action treatment"]; and *Dailey v. Sears, Roebuck and Co.* (2013) 214 Cal.App.4th 974, 997 [court properly considered "evidence disputing the uniform application of [an employer's] business policies and practices," showing that a policy based theory of liability "was not susceptible of common proof at trial."].) These appellate authorities do not vanish because they are ignored; instead they must be acknowledged and affirmed, repudiated or reconciled with contrary authorities. Legal certainty and clarity further justice; the ambiguity and conflict illustrated by this opinion are obstacles to justice. This court's guidance about which class action certification authorities govern or how they are to be harmonized is necessary lest we continue in a state of "confusion, worse confounded."

Nor does categorizing or "labeling" evidence about individualized issues over common ones in class certification decisions as going to the issue "damages" and not "liability" analytically helpful. That, in fact, is a "dodge," reminiscent of Abraham Lincoln's reputed question to an audience, "How many legs does a calf have if you call a tail a leg?' When the audience shouted out "five," Lincoln corrected them by answering, "No. Four. Calling a tail a leg doesn't make it one." (*REMINISCENCES OF ABRAHAM LINCOLN BY DISTINGUISHED MEN OF HIS TIME* (Allen Thorndike Rice ed. (1909), p. 242.) No *ipse dixit* by the court can convert evidence pertaining to liability into evidence of damages. Liability is a *sine qua non* of damages, not the other way around. In

some cases there may be common evidence probative of both liability and damages,[4] but the fact that evidence of liability is also probative of damages does not obviate the due process concerns that attend imposing liability absent individualized hearings on affirmative defenses. Here, evidence adduced by the trial court that persuaded it to reverse itself and decertify the class it had earlier certified went to proving or disproving the employer's liability to numerous individual employees, not merely to their damages.

In sum, plaintiffs and the appellate opinion rely on authorities that downplay the importance of evidence in class certification decisions and elevate the importance of liability "theories" stated in plaintiffs' complaint that might be subject to common proof. That these differences in approach to class certification decisions matter and are in urgent need of reconciliation by this Court cannot be denied.

2. Review is warranted to clarify the holding of *Duran v. U.S. Bank Nat. Assn.* and its application to this and similar cases.

Duran, echoing *Dukes, supra*, 564 U.S. at 367, established a clear limit on the use of statistical sampling for class certification: "A class *cannot* be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." (59 Cal.4th at 35; italics added.) Moreover, "any class action trial plan, including those involving statistical methods of proof, must allow the defendant to litigate its affirmative defenses. . . . If statistical methods are ultimately incompatible with the nature of the plaintiffs' claims or the defendant's defenses, resort to statistical proof may not be appropriate. Procedural innovation must conform to the substantive rights of the parties." (*Id.* at 40.) Yet this cautionary limitation was ignored here by the appellate opinion, which construed *Duran* as holding merely that "sampling errors required reversal" in that case. (210 Cal.Rptr.3d 235.) This mischaracterization of *Duran* relegates it to insignificance by focusing on one aspect of statistical sampling used in that case – its errors – to the detriment of its holding that reliance on statistical sampling as a means of "abridg[ing] a party's substantive rights," especially its *liability* and right to litigate individual defenses to liability, violates due process. (*Duran*, *supra*, 59 Cal.4th at 34.)

The appellate opinion acknowledges that the "trial court's conclusion that statistical sampling will lead to over and under recovery has not been explicitly resolved

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[4] "It is no wonder that class certification turns not only on the framing of the legal and factual questions but also on the *type of evidence available* and *whether it applies to all class members or is unique to the individual. Both common legal questions and common factual evidence must predominate in order for a court to certify a class.*" (Shawn S. Ledingham, Jr. (Note), *Aggregate Reliance and Overcharges: Removing Hurdles to Class Certification for Victims of Mass Fraud* (2010) 85 *N.Y.U. L. REV.* 289, 294; italics added.)

by California courts," but glosses over this lacuna with the *non sequitur* that "statistical sampling has been approved as a method of determining *damages*." (210 Cal.Rptr.3d at 236; italics added.) But *liability*, not only damages, is what the appellate opinion permits "statistical sampling" to achieve here through certification. This is, as stated, contrary to the admonishment that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." (*Duran, supra*, 59 Cal.4th at 35.)

There is plainly a sharp difference of view here between the litigants and the trial and appellate courts as to what *Duran* means for the scope and application of statistical sampling and extrapolation for determining the "nature of work" exception/defense in meal and rest break violation claims. This disagreement invites – indeed, implores – review and guidance from the Court.

CONCLUSION

For the aforementioned reasons, and others CJAC will seek to provide should review be granted, we urge the Court to order review and iron out the anomalies this opinion presents.

Respectfully submitted,

Fred J. Hiestand, General Counsel
Civil Justice Association of California

Proof of service attached

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 3rd Avenue, Suite 1, Sacramento, CA 95817.

On February 27, 2017, I served the foregoing document(s) described as: *Amicus Curiae* Letter Brief of the Civil Justice Association of California in Support of Review in *Lubin, et al. v. The Wackenhut Corporation*, S239254 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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

Executed this 27th day of February 2017 at Sacramento, California.

David Cooper