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April 24, 2012

Via Federal Express

Chief Justice Cantil-Sakauye
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Petition for Review in *Duran v. U.S. Bank National Association*, No. S200923

Dear Chief Justice Cantil-Sakauye and Associate Justices:

I write pursuant to California Rules of Court, rule 8.500(g), on behalf of myself and my law firm, to urge the Court to grant the plaintiffs' Petition for Review in *Duran v. U.S. Bank N.A.*, No. S200923.

I am one of the founding partners of Chavez & Gertler LLP. Since my firm's inception, our practice has focused on the representation of consumers victimized by unfair business and lending practices and groups of workers injured by wage and hour violations—the prototypical beneficiaries of the class action device. My interest in the Court granting review of the decision in *Duran*, therefore, is that of a class action practitioner with multiple clients and cases that will be affected by *Duran*, particularly if they go to trial.

What makes the *Duran* case of particular interest to my practice and my clients is that the Court take this opportunity to clarify the rules of law pertaining to class action *trials*. More and more class actions are going to trial than ever before. And while the rules are well-settled with regard to the question of whether an action should be certified as a class action in the first instance, the rules regarding how a class action should be tried once it has been certified are much less well-defined.

This Court has previously instructed lower courts to be creative and procedurally innovative in trying class actions. As this Court noted in *Sav-on Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319:

> California courts and others have in a wide variety of contexts considered pattern and practice evidence,

> statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.

(*Sav-on, supra*, 34 Cal.4th at p. 333; *accord Capitol People First v. Dept. of Developmental Services* (2007) 155 Cal.App.4th 676, 695 ["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."].) Such practices also find ready support in several decisions by the Courts of Appeal. (*E.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 750-51; *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 421 [relying on statistical evidence that demonstrated that individual hiring and promotional practices across stores manifested themselves in the same general fashion]; *Reyes v. San Diego County Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1279 ["whether the County applied an unlawful sanctioning process can be proved by reviewing the County's regulations, the testimony of the County's welfare employees as to the standard practices followed in making sanctioning decisions, as well as a *sampling* of representative cases probative of the County's practice of sanctioning for nonwillful noncompliance with work program requirements."].)

The Court of Appeal's opinion in *Duran*, however, sharply diverges from this jurisprudence. The divergence is due to the fact that the opinion is not grounded in California law but, rather, on the Court of Appeal's interpretation and application of the United States Supreme Court's decision in *Wal-Mart Stores v. Dukes* (2011) 131 S.Ct. 2541. (*See Duran v. U.S. Bank Nat. Assn.* (2012) 203 Cal.App.4th 212, 259, fn. 65 ["While *Wal–Mart* is not dispositive of our case, we agree with the reasoning that underlies the court's view"].) In *Wal-Mart*, the United States Supreme Court held, in the context of a motion for class certification under Federal Rule of Civil Procedure 23, that a class action could not be sustained where the defendant's liability to the class was to be determined through a sampling process, wherein the percentage of claims determined to be valid through a trial of a selected sample of cases would then be applied to the entire remaining class. (*Wal-Mart, supra*, 131 S.Ct. at p. 2561.) The Court of Appeal in *Duran* took *Wal-Mart* and extended it into the context of class action *trials* irrespective of California law regarding both class certification and class action trials.

Absent from the United States Supreme Court's and the Court of Appeal's analysis is what has long been the practice in California—that it is not necessary that a defendant be proven liable to every member of a class. Rather, under the prevailing law in this state it is sufficient for the plaintiff to establish that the defendant has violated the law and is liable to some members of the class, with the court reserving the question of each class member's eligibility for damages to further proceedings overseen by a special master, a claims process, or even statistical extrapolation where such analysis is properly grounded. (*See, e.g., Reyes, supra*, 169 Cal.App.3d at p. 1279.) *Wal-Mart* has no bearing on such California class action jurisprudence developed pursuant to Code of Civil Procedure section 382.

As noted at the outset, more and more class actions are going to be tried in the near future. Accordingly, more and more trial courts will be required to steer each trial to judgment. It would be inappropriate to tie the trial courts' hands as the *Duran* court has done and remove from the court's arsenal the use of statistically valid methods of proof to establish liability overall, leaving individual determinations of damages (including the potential for zero damages) to proceedings specifically tailored to resolve such questions.

I strongly believe that if the Court does not grant review, or does not order that the opinion be depublished, there will be dramatic consequences to the millions of Californians who suffer wrongs on a daily basis but whose only relief post-*Duran* is to file individual actions—an option that, in these trying economic times, is increasingly unavailable to them. This would be a boon for corporate malfeasors around the state. Accordingly, I urge the Court to grant review so that the Court can provide practitioners and courts alike the necessary guidance regarding how they should try class actions.

Thank you for this opportunity to submit this Amicus Curiae Letter in support of the Petition for Review in *Duran v. U.S. Bank N.A.*

Very truly yours

Jonathan E. Gertler

Jonathan E. Gertler

PROOF OF SERVICE
(C.C.P. §1013a(3))

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

I am employed in the County of Marin, State of California. I am over the age of 18 years and not a party to the within action; my business address is Chavez & Gertler LLP, 42 Miller Avenue, Mill Valley, CA 94941.

On April 24, 2012, I served the foregoing documents:

- **Amicus Curiae Letter in Support of Petition for Review in *Duran v. U.S. Bank National Association,* No. S200923, by Jonathan E. Gertler**

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed to each as follows:

Plaintiffs' Counsel:	**Defendant's Counsel:**
Edward J. Wynne Wynne Law Firm 100 Drakes Landing Road, Suite 275 Greenbrae, CA 94904 Ellen Lake Law Offices of Ellen Lake 4230 Lakeshore Ave. Oakland, CA 94610	Timothy Freudenberger Alison Tsao Kent Sprinkle Carothers DiSante & Freudenberger LLP 601 Montgomery St., Suite 50 San Francisco, CA 94111-2603
Hon. Robert Freedman Alameda County Superior Court Department 20 1221 Oak Street Oakland 94612	Court of Appeal First Appellate District 350 McAllister Street San Francisco, CA 94102-7421

[X] **BY MAIL:** I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Mill Valley, California.

Executed on April 24, 2012, at Mill Valley, CA.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Jenna Raden