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April 16, 2012

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

Subject: *Duran v. U.S. Bank Nat'l Ass'n* (No. S200923) – Petition for Review

Madam Chief Justice and Associate Justices:

I. OVERVIEW

This amicus letter is submitted pursuant to Rule 8.500(g) of the California Rules of Court, and supports the Petition for Review submitted by Plaintiffs and Respondents in the above-captioned matter, *Duran v. U.S. Bank* ("*Duran*").

Review is necessary because *Duran* is directly contrary to California's established class action jurisprudence. Indeed, "[t]his court long ago acknowledged that public policy encourages the use of class actions." (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (Kennard, J., concurring & dissenting)[citing *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473].) However, opponents of California's class action jurisprudence will attempt to use *Duran* to graft unprecedented strictures onto the requirements for class certification and proscribe the use of sound statistical evidence. Moreover, *Duran* seemingly wrests from the trial courts the discretion over certification decisions that has long been their province. (See *Sav-On v. Super Ct.* (2004) 34 Cal.App.4th 319, 326-27 [unanimously affirming trial court's discretion in granting class certification; "[a] trial court's ruling on class certification is reviewed for 'abuse of discretion'"]; *Dunbar v. Albertson's*, 141 Cal.App.4th 1422 (2006)[affirming trial court's denial of class certification under abuse of discretion standard].)

Duran's practical consequences are anticipated to be dramatic, with one attorney who represents class-action defendants predicting that *Duran* will result in a 95 percent reduction in the number of classes certified seeking remedies for workplace violations. (See Sumers, "Appellate ruling could dampen employment class actions," *San Francisco Daily Journal* (Feb. 8, 2012) (cited in Petit. for Rev. at 5).)

Relying on shards of dicta from federal-court rulings, *Duran* represents an untenable departure from California's, and this Court's, class-action jurisprudence. Accordingly, review of *Duran* is necessary to remedy the decision's multiple legal errors.

II. STATEMENT OF INTEREST

Initiative Legal Group is a forty-plus lawyer consumer rights law firm based in Los Angeles. We have been dedicated to exclusively representing plaintiffs for ten years, chiefly in representative actions. Our firm has served as counsel in over 60 class actions resulting in tens of millions of dollars for workers as well employer adoption of policies and practices conforming to the California Labor Code.

The need for this Court's review of *Duran* is vividly exemplified by our firm's experience representing over 10,000 California workers in *Zamora v. Countrywide, et al* (L.A. Super Ct. 360026). *Zamora* alleges Labor Code violations, including the defendants' failure to provide meal and rest breaks, and late payment of final wages. The action was certified on June 10, 2010. The defendants' motion to decertify has been denied. The testimony and reports of the plaintiffs' data analysis and survey experts have endured evidentiary attacks through two separate motions.

Yet, with the issuance of *Duran*, the evidence offered by the plaintiffs' experts – data analysis showing meal break and late pay violations, survey evidence buttressing meal and rest break claims – will be caught between established California jurisprudence and this Court's endorsement of such methodologies on the one hand and what defendant will argue are *Duran*'s new dictates on the other. Seizing the opportunity, and with a trial date set for this August, Countrywide is renewing its decertification efforts. Like other defendants, they are relying on *Duran*, despite the weight of California authority supporting the exercise of trial court discretion in the action having been certified as well as the admissibility of expert evidence particularly apposite to the adjudication of class-wide claims.

Our firm's clients in the *Zamora* action, as well as those in numerous similar cases identified in other amicus letters, are entitled to a class-wide trial on the merits. *Duran*'s radical departure from California's established class-action jurisprudence functions as a blockade on the enforcement of California's workplace protections.

III. *DURAN* RAISES IMPORTANT QUESITON OF LAW, NECESSITATING REVIEW

Supreme Court review is warranted where it is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. R. Ct., rule 8.500(b)(1).) Review is thus necessary here, both because *Duran* fractures the established uniformity of California's class-action jurisprudence, and because an important question of law is implicated. Indeed, if *Duran* virtually eradicates class actions, as

some seeking to effectively repeal Code of Civil Procedure section 382 have predicted, it is difficult to conceive of an issue more deserving this Court's attention.

From a ruling ostensibly as to the plaintiff's trial plan, *Duran* arguably imposes an unprecedented class certification burden. According to opponents of California's traditional class-action jurisprudence, *Duran* has three main holdings. Foremost, *Duran* fundamentally alters California's class action jurisprudence by purporting to nullify the long-established doctrine that class certification does not require that all class members' circumstances and factual settings be identical. (See, e.g., *Sav-On,* supra, 34 Cal.4th at pp. 332-40 [certification appropriate despite factual differences among class members alleging improper exemption from overtime pay]; *Richmond v. Dart*, supra, 29 Cal.3d at 462 [opposition of portion of class to certification not per se impediment to certification].)

Second, *Duran* arguably holds that defendants have a right to individualized determinations as to affirmative defenses in class actions. (See *Duran* at 48-49.) This holing is without precedent in California caselaw. (See Petit. for Rev. at 20.) By creating a new right to individualized defenses purportedly based in due process, *Duran's* newly created doctrine negates four decades of legislation and caselaw that are the superstructure around California's public policy choice that class treatment is ideally suited, and often necessary, for the vindication of important workplace and consumer rights. *Duran* erroneously infers this new doctrine from a far narrower *federal* ruling, in *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. ___. The *Dukes* holding as to "trial by formula" was based solely on a provision of the federal Title VII statute. Yet *Duran* would import that narrowly drawn rationale into California law and apply it, apparently, to all Section 382 class actions, seemingly indifferent to established authority. (See, e.g., *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 752 [defendant in misclassification case entitled only to adjudication as to "its total or aggregate liability to the plaintiff class for unpaid overtime compensation"].)

Third, *Duran* also appears to hold that liability may rarely, if ever, be determined with reference to representative, or sampled, statistical evidence. (See *Duran* at 52.) *Duran's* holding as to statistical evidence is no more sound than the *Duran* "individual defense" holding. So, too, is *Duran* sweeping rejection of statistical evidence contrary to this Court's precedents. In addition to underscoring trial court discretion where class certification decisions are concerned, this Court's unanimous *Sav-On* decision also rejected that defendant's contention that class certification is improper where some class members might ultimately be found not to have been subjected to the at-issue illegal conduct. *See Sav-On*, supra, at 339. More recently, too, this Court has recognized that precisely the statistical methodologies that are assailed in *Duran* are sound and essential case-management tools:[1]

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[1] Numerous state and federal courts have concluded similarly. (See, e.g., *Int'l B'hood of Teamsters v. United States* (1977) 431 U.S. 324, 337-40 (statistics "competent in

> Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability. (See, e.g., *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 749-755 [upholding as consistent with due process the use of surveys and statistical analysis to measure a defendant's aggregate liability under the IWC's wage orders]; *Dilts v. Penske Logistics, LLC* (S.D.Cal. 2010) 267 F.R.D. 625, 638 [certifying a meal break subclass because liability could be established through employer records and representative testimony, and class damages could be established through statistical sampling and selective direct evidence]; see generally *Sav-On*, at p. 333 & fn. 6).) "[S]tatistical inference offers a means of vindicating the policy underlying the Industrial Welfare Commission's wage orders without clogging the courts or deterring small claimants with the cost of litigation." (*Bell*, at p. 751.)

(*Brinker v. Super. Ct.* (2012) ___ Cal.4th ___, Slip op. at 3, (Werderger, J., concurring).)[2]

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proving" liability); *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1279 (reversing denial of class certification because liability could have been determined through "a sampling of representative cases"); *Capitol People First v. Dep't of Developmental Services* (2007) 156 Cal.App.4th 676 ("[N]umerous courts have approved the use of statistics, sampling, policies, administrative practices, anecdotal evidence, deposition testimony and the like to prove classwide behavior"); *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174 (approving use of regression analysis to determine liability). *Davis v. Southern Bell Tele.* (S.D. Fla. Feb., 1, 1994) 1994 U.S. Dist. LEXIS 13257 (approving use of survey evidence); *Morgan v. Family Dollar Stores, Inc.* (11th Cir. 2008) (accepting a trial court's extrapolation to absent class members from representative testimony about the duties of store managers); *Reich v. Gateway Press, Inc.* (3d Cir. 1994) 13 F.3d 685 (misclassification liability determined with reference to testimony of 22 of 70 employees); *Brock v. Norman's Country Market* (11th Cir. 1988) 835 F.2d 823 (misclassification determined with reference to fewer than all employees); *Donovan v. Burger King* (1st Cir. 1982) 672 F.2d 221, 224-25 (class-wide liability as to 246 employees from 44 locations determined with reference to testimony from employees from six stores); *Jankowski v. Castaldi* (E.D.N.Y Jan. 13, 2006) 2006 WL 118973 (FLSA liability determined with reference to representative sample of employees).)

[2] *The Manual for Complex Litigation* has long embraced the use of survey and other statistical methods:

Indeed, as the *Brinker* concurring justices noted just last week, without such statistical evidence, class actions are, as a practical matter, virtually impossible. And by potentially proscribing the use of evidence that is a *sine qua non* of class actions, *Duran* might have consequences equivalent to a complete repeal of section 382 and the class treatment authorized by it. A ruling of such scope is plainly far beyond the authority of an intermediate appellate court, accentuating the necessity of review.

Duran's usurpation of trial-court discretion is all the more astonishing when the case's procedural posture is subjected to scrutiny. From the plaintiff's submitted trial plan, the First Appellate District forged the novel class-action doctrine described above. However, were the trial plan ultimately proved to be faulty, there are ample options under established case-management principles, all grounded in trial-court discretion as a first principle. Trial courts are empowered to, and often do, revisit trail plans, making revisions and amendments informed by the action's progress. By not only interceding into the trial court's authority and terminating the *Duran* action, but

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> Statistical evidence and expert testimony typically play a significant role in the liability phase of a trial, especially where the plaintiff is alleging disparate impact as opposed to intentional discrimination. The probative value of statistical evidence offered by the parties will depend, among other things, on the relevant labor pool, the geographic area, and other comparison pools. The court must ensure that such evidence meets the requirements of *Daubert v. Merrel Dow Pharmaceuticals.* The "Reference Guide on Statistics" in the *Reference Manual on Scientific Evidence* may be helpful in assessing statistical evidence in employment discrimination cases.

(Herr, *Manual for Complex Litigation* (2008) § 32.45 at 778.) Additionally, the *Reference Manual on Scientific Evidence* has endorsed the utility of statistical evidence:

> Although surveys are not the only means of demonstrating particular facts, presenting the results of a well-done survey through testimony of an expert is an efficient way to inform the trier of fact about a large and representative group of potential witnesses. In some cases, courts have described surveys as the most direct form of evidence that can be offered. Indeed, several courts have drawn negative inferences from the absence of a survey, taking the position that the failure to undertake a survey may strongly suggest that a properly done survey would not support the plaintiff's position.

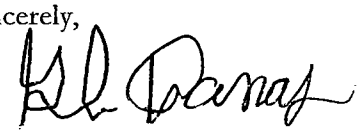
(Saks, *Annotated Reference Manual on Scientific Evidence*, (2d Ed.) at 343.)

promulgating doctrines of general application, the *Duran* panel acted contrary to well-established class action jurisprudence.

IV. CONCLUSION

For the reasons set forth herein, *Duran* urgently requires Supreme Court review, and reversal, reasserting a trial courts' discretion in class certification decisions and trial management, including the use of survey and sampling methodologies, and rejecting the unprecedented encumbrances that *Duran* has grafted onto California class actions.

Sincerely,



Glenn A. Danas

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1800 Century Park East, 2nd Floor, Los Angeles, California 90067.

On **April 16, 2012**, I served the document(s) described as:

1) AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW

on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof [ ] to interested parties as follows [or] [✓] as stated on the attached service list:

SEE ATTACHED SERVICE LIST

[✓] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[ ] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

[ ] **BY FAX:** I hereby certify that this document was served from Los Angeles, California, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

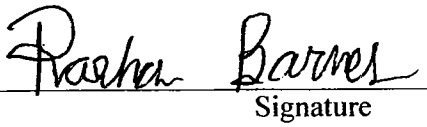
[ ] **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[ ] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

[✓] **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this **April 16, 2012**, at Los Angeles, California.

Rashan R. Barnes
Type or Print Name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