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April 3, 2012

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

Re: ***Sam Duran, et al. v. U.S. Bank National Association, California Supreme Court Case No. S200923,***
Amicus Curiae Letter in Support of Petition for Review of Decision of the Court of Appeal for The First Appellate District, Division One, Case Nos. A12557 and A126827 (February 2, 2012)

Dear Chief Justice and Associate Justices:

This is a letter under Rule 8.500(g), California Rules of Court, in support of plaintiffs' petition for review in the above-captioned matter.

This case provides this Court with an opportunity in the evolving case law surrounding California wage and hour litigation, as well as class action litigation more generally, to resolve important questions of law of statewide significance, involving fundamental disagreement between courts of appeal, for the maintenance of class actions on behalf of aggrieved workers.

STATEMENT OF INTEREST

Our firm represents aggrieved workers, who seek redress for employer violations of California's wage and hour laws, in class action litigation. Currently, in pending litigation, we (and our co-counsel, Cotchett, Pitre & McCarthy; Frank J. Coughlin, APLC; Jerry K. Cimmet, Esq.; and Gerald M. Werksman, Esq.) represent nurses and other health care workers in a lawsuit against a number of integrated hospitals (IHHI) in Orange County who seek restitution and damages against the hospitals for, among other things, repeated overtime law violations: *Alexandra Avery, et al. v. Integrated Healthcare Holdings, Inc., et al.*, Superior Court (County of Orange), Case Nos. 30-2009-00274060 and 30-2010-0338805.

The *IHHI* litigation, and other class action litigation in which we are involved, directly pose issues of class action certification, and the appropriate standards of proof

at the class certification stage and in the subsequent trial thereafter, that will undoubtedly, at the urging of defendants, raise the specter of the Court of Appeal's decision in *Duran* and its impact on the viability of class actions seeking the vindication of workers' rights.

This threat is not remote. Indeed, the *Duran* Opinion has, in fact, been recently cited by defense counsel in their efforts to oppose class action certification in other wage and hour class action litigation, pending in Federal District Court, in which we (and our co-counsel, Lovell Stewart Halebian LLP; Winne, Banta, Hetherington, Basralian & Kahn, PC; Kessler Topaz Meltzer & Check, LLP; and Jerry K. Cimmet, Esq.) are also presently involved, namely, *Bouder, et al. v. Prudential Insurance, Inc.*, and *Wang, et al. v. Prudential Financial, Inc., et al.*, U.S.D.C. D.N.J., Civil Action No. 06cv04359 (DMC)(MF).

DURAN RAISES EXTREMELY IMPORTANT QUESTIONS OF LAW THAT THIS COURT SHOULD REVIEW

It is well-established that review is "necessary to secure uniformity of decision or to settle an important question of law." CRC Rule 8.500(b)(1).

As the petition for review more fully advises the Court, the *Duran* Opinion, if accepted by other courts, fundamentally changes the landscape of class action wage and hour litigation, imposing standards of proof at both the class certification stage and trial stage which squarely run contrary to previous authority.

First, the *Duran* Opinion appears to reject the traditional and long-accepted premise of class action certification in California that it is not necessary to establish that there are absolutely no factual differences between class members. See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 332-340 [class certification appropriate if there is evidence of widespread de facto labor violations even though there might be some factual differences between class members]; *Richmond v. Dart Industries* (1981) 29 Cal.3d 462 [class treatment appropriate despite hostility by part of putative class]; *Bell v. Farmers Insur. Exchange* (2004) 115 Cal.App.4th 715 [fact that 9% of class had no claim for overtime does not preclude class certification].

Second, while the Court of Appeal in *Duran* rejected class certification where some differences were perceived to exist between class members, it also seemed at the same time to ensure the inevitability of that result, *i.e.*, that class certification would be denied, by requiring that an individualized determination of each exemption defense

raised by the employer be made for each and every class member. The *Duran* Opinion thus creates a Scylla and Charybdis between which no ship should or could realistically be expected to sail, and hence deprives workers of the otherwise available class action remedies for wage and hour violations of the California Labor Code.

Third, even assuming that a putative class action could survive the individualized treatment advanced by the *Duran* Opinion, the Court of Appeal went still further to strike down the well-established patterns of proof used in wage and hour class actions through the means of statistical sampling, surveys and other forms of representative evidence. If accepted as the norm in class action litigation, such judicial rejection of and animosity toward traditional statistical methods of proof could easily make great mischief for the collective assertion of rights by workers in a host of litigation never intended by the Legislature. Indeed, the very types of statistical sampling and other representative proofs, rejected by the Court of Appeal in *Duran*, were expressly and favorably acknowledged in the class certification process by this Court in *Sav-On Drug Stores, Inc. v. Superior Court* (2004), 34 Cal.4th 319, 333: "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." In short, to prevent the obviously present mischief posed by the *Duran* Opinion this Court's intervention is called for and clearly necessary.

CONCLUSION

For the reasons stated above, we believe that this case urgently requires the Court's attention. We further submit that the Court should grant the plaintiffs' petition for review.

Respectfully submitted,
LAW OFFICES OF JOHN M. KELSON

By: _____
JOHN M. KELSON

JMK:pj

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA.

I, the undersigned, declare that I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 2000 Powell Street, Suite 1425, Emeryville, CA 94608. On April 3, 2012, I served upon the interested parties in this action the following document described as:

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW

By placing a true and correct copy thereof enclosed in sealed envelopes addressed as stated on the attached service list for processing by the following method:

☑ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Emeryville, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on April 3, 2012, at Emeryville, California.

Trinh Doan

SERVICE LIST

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