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April 25, 2012

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

Re: Sam Duran, et al. v. U.S. Bank National Association
California Supreme Court Case # S00923
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

This firm and our co-counsel, Law Offices of Scot D. Bernstein, A Professional Corporation, submit this letter under Rule 8.500(g) of the California Rules of Court as amicus curiae to urge the Court to grant review of the Court of Appeal's decision in *Duran v. U.S. Bank National Association* ("*Duran*").

For years, class action cases have been the large majority of both our firms' practices. In just the past six months, our firms jointly settled a number of class action cases that have resulted in millions of dollars being paid to thousands of workers whose employers allegedly failed to pay them their statutorily mandated wages. Our class action and representative action practices have yielded reported appellate decisions including *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 67 Cal.Rptr. 120 (Keller Grover LLP as counsel for successful appellee), *Lazarin et al. v. Total Western, Inc.* (2010) 188 Cal.App.4th 1560, 116 Cal.Rptr.3d 596, review denied, Jan. 19, 2011, S188164 (both firms as co-counsel with Law Offices of Ellyn Moscowitz in a successful writ on behalf of a class of plaintiffs), and *Lippitt v. Raymond James Financial Services, et al.,* 340 F.3d 1033 (9th Cir. 2003) (Law Offices of Scot D. Bernstein as co-counsel for successful appellant).

Putting aside the class actions that our firms have settled in the last several years, our firms have class actions currently pending on behalf of thousands of California workers as well as other class actions that we intend to file imminently. *Duran* will adversely impact those cases if allowed to remain a part of California class action jurisprudence. And the workers whose rights those actions seek to vindicate will suffer

as well, whether through reduced settlement values or by having their opportunity for relief foreclosed by a denial of certification.

We have read the *Duran* petition for review and several amicus curiae letters urging this Court to grant review. We join in their arguments and will not lengthen our letter by restating them here. Instead, we will highlight a few key matters that, in our view, make it essential that *Duran* not remain a part of California law.

Particularly disturbing about the *Duran* opinion are its sweeping and simply incorrect statements about courts being "generally skeptical of the use of representative sampling to determine liability, even in cases in which plaintiffs have proposed using expert testimony and statistical calculations as the foundations for setting sample size." (Slip opinion, p. 52.) That statement is contrary to this Court's decision in *Sav-On Drugs, Inc. v. Superior Court* (2004) 34 C.4th 319, 17 Cal.Rptr.3d 906, and the host of other decisions cited in *Sav-On*, not to mention cases decided in the years since. Among the latter is this Court's recent decision in *Brinker Restaurant Corporation v. Superior Court of San Diego County*, Case # 166350. *Brinker* reaffirmed yet again the vitality of prior decisions finding the use of sampling and statistical evidence appropriate. Indeed, those cases were correct in so finding, as the mathematics underlying the concept of statistical sampling is indisputable. A party may argue its opponent performed the analysis incorrectly or might challenge the randomness of the sampling technique, and the court can resolve those disputes; but a court cannot credibly reject the validity of the mathematics itself.

Duran stands contrary to that well-developed body of law and should not remain a part of it. If it does, its insistence on individual proof from every class member will drag out beyond all reason those few cases that are able to go forward on a class-wide basis, denying trial courts and the public much of the judicial economy that is an intended benefit of class actions. Further, the outright denial of class-wide remedies in other cases will lead to increased numbers of individual cases with their attendant costs and risk of inconsistent results. In the end, far larger numbers of wrongs simply will go unaddressed.

As a practical matter, the presence of a single appellate decision that runs contrary to established law can wreak havoc in resolving cases. The non-conforming decision can lead trial courts to incorrect decisions, increasing the burdens on the appellate courts. Those incorrect trial court decisions that are allowed to stand because the losing party lacks the resources to challenge them yield unjust outcomes contrary to what the law should have required. In a case where certification is improperly denied to a class of workers, the workers fail to receive wages belonging to them; the wrongdoing employer retains the ill-gotten gains; the employer's law-abiding competitors are disadvantaged by the unlevel playing field on which they must compete; and the resulting random and fragmentary enforcement of the law teaches the public the cynical lesson that laws can be flouted almost without consequence to the wrongdoer. The Supreme Court can prevent those harms during the short window in which review can be granted.

Not surprisingly, the practical impact of a non-conforming decision extends to mediations and settlement negotiations as well. Responsible counsel will factor into their calculations the risk that the trial court will rely on the non-conforming appellate decision to the detriment of the class if the case goes forward. That process inevitably reduces settlement values. Thus, apart from the burden on the appellate courts, the ills described above in the context of trial court decisions exist in the settlement context as well.

Turning from its broader impact on class actions generally to its narrower impacts within them, *Duran* also throws a wrench into the process of devising a trial plan. One might question whether any trial plan ever would pass muster under the standards set forth by that case.

Further, the pressure to create a trial plan will be increased by the apparent do-or-die nature of the process if *Duran* remains a part of California class action law. If a trial plan does not pass muster, why should decertification be the automatic response, whether by a court of appeal or by a trial court that takes from *Duran* the concept that that is the correct approach? In view of California's strong public policy favoring class actions, it would make far more sense for the court to send the trial plan back for modification consistent with the court's concerns. Indeed, why should an entire class of injured persons – workers who have been deprived of their wages or overtime pay, for example, or consumers who have been defrauded – be deprived of a remedy just because the first attempt at a workable trial plan didn't satisfy the court? If decertification is the response to a single inadequate trial plan, the putative class has one shot at certification and the defendants have multiple shots at defeating it – once by opposing the certification motion and, if Duran's procedural history is used as a guide, a second and third by moving for decertification. All of this strikes an imbalance that seems certain to hobble class actions and prevent their use as a remedial and enforcement mechanism.

For these reasons and those stated in the petition for review and by the other amici curiae, we are convinced that *Duran*, if allowed to remain a part of California's class action jurisprudence, will significantly impair class actions as an enforcement mechanism in California and will invite lawbreaking on a scale that is huge in the aggregate but too small on an individual level to allow for meaningful remedies, enforcement or deterrence. We hope that the Court will grant plaintiffs' petition for review.

Respectfully submitted,

Law Offices of Scot D. Bernstein,
A Professional Corporation

Keller Grover LLP

By: 
Eric A. Grover

PROOF OF SERVICE

STATE OF CALIFORNIA

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the action. My business address is Keller Grover LLP, 1965 Market Street, San Francisco, California 94103.

On Wednesday April 25, 2012 I served the foregoing document described as:

Letter to Honorable Chief Justice Tani Cantil-Sakauye and Honorable Associate Justices (Original Plus 8 Copies)

On the interested parties by administering a true copy either by facsimile or in sealed envelopes addressed as follows:

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

Ann Stanton