MARKUN
ZUSMAN
COMPTON LLP

Attorneys at Law
Los Angeles · Portland · San Francisco

Jeffrey K. Compton
jcompton@mzclaw.com

May 8, 2012

Honorable Chief Justice Tani Cantil-Sakauye
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:

Pursuant to California Rules of Court Rule 8.500(g), the law firm of Markun Zusman & Compton, LLP respectfully submits the following letter in support of the Plaintiff's March 19, 2012 Petition for Review of the above-referenced matter (hereinafter, "*Duran*").

Markun Zusman & Compton, LLP has represented, and currently represents, numerous employees in various wage and hour and consumer class actions. We have the following such cases, among others, currently pending: *Baker v. GEO Group, Inc.* (ACSC Case No. RG11580664); *Vasquez v. Grassroots Campaigns, Inc.*, (SFSC Case No. CGC-09-494506); *Buccieri v. Palm* (SFSC, Case No. CGC-09-489578); *Brady v. Deloitte & Touche, LLP*, (N.D.C.A. Case No. C-08-00177 SI; and *Kress v. PriceWaterhouseCoopers LLP*, (E.D.C.A. Case No. 2:08-CV-00965-LKK-GGH). These cases are all potentially impacted by the *Duran* decision, and we therefore respectfully request that review be granted.

First, *Duran* found that the trial court exceeded acceptable due process parameters by limiting the presentation of evidence about class members outside of the representative sample. This ruling calls into question the ability of plaintiffs to use representative testimony or statistical evidence at trial. Prior to *Duran*, caselaw supported the use of such testimony. (See, *Sav-On Drug Stores, Inc. v. Superior Court*, (2004) 34 Cal.4th 319, 33 ["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 make class certification appropriate."]; See also, *Bell v. Farmers Insurance Exchange*, 115 Cal.App.4th 715 (2004)). Defendants are now using *Duran* to argue that representative testimony is no longer appropriate and that defendants have the right to obtain testimony from all class members at trial.

Second, due to the Court of Appeal's apparent belief that individualized determinations of the exemption defense are necessary, we are concerned that *Duran* will be read to hold that trial courts must deny certification if there are any individual questions of fact or law. This reading appears wholly inconsistent with years of caselaw, which requires only that common questions predominate. (See, *Sav-On* at 326).

In sum, we request that the Supreme Court accept review and provide further guidance on the appropriateness of class certification in wage and hour cases, and on how wage and hour class actions can be successfully tried. We believe *Duran* is either an aberrant decision that should be reversed, or needs to be clarified to limit its potential scope and impact. Thank you for your consideration of this matter.

Very truly yours,

MARKUN ZUSMAN & COMPTON LLP

Jeffrey K. Compton