NATIONAL CONSUMERS LEAGUE
1701 K Street, NW, Suite 1200 Washington, DC 20006
Main: (202) 835-3323 Fax: (202) 835-0747 www.nclnet.org

April 19, 2012

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

RE: Petition for Review- *Duran, et al. v. U.S. Bank Nat'l Ass'n* (No. S200923)

Honorable Justices:

Pursuant to California Rule of Court 8.500(g), The National Consumers League respectfully submits this letter in support of the Petition for Review filed on March 19, 2012, in the matter of *Duran, et al. v. U.S. Bank National Association*, (2012) 203 Cal. App. 4th 212 (*Duran*) by Petitioners, Sam Duran, *et al.*

STATEMENT OF INTEREST

The National Consumers League ("NCL"), founded in 1899, is the nation's oldest consumer organization. The mission of the NCL is to promote fairness and economic justice for consumers and workers in the United States and abroad. The NCL is a non-profit advocacy group which provides government, businesses, and other organizations with the individual's perspective on concerns including, *inter alia*, child labor, workers rights, and other work place issues. The NCL appears before legislatures, administrative agencies, and the courts across the country, advocating the enactment and vigorous enforcement of laws that effectively protect consumers and employees. The NCL also educates the public in ways to avoid fraud in the marketplace through its National Fraud Center and seeks to increase awareness of and mobilize public resistance to unsavory, anti-consumer behavior. For more than 100 years the NCL has vied to promote a fair marketplace for workers and consumers. This was the reason for the NCL's founding in 1899 and still guides it into its second century.

WHY REVIEW SHOULD BE GRANTED

At issue before the Court is a question of pressing and surpassing importance to consumers, employers, and employees not only throughout the State but across the

country. This Court has historically been at the forefront of worker and consumer protection and the *Duran* opinion has the potential of curtailing such protections. As Petitioners correctly note, *Duran* openly challenges previously well-established principles that when common questions of law or fact predominate, the class should be certified.

Duran, if not overturned or if accepted by other courts (within and without this State), will fundamentally alter the principles applied to class certification and trials in not only employment but consumer and antitrust litigation. First, *Duran* sets a new standard compelling denial of class treatment when there exists *any* individual questions of law or fact. This contradicts *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 332-34 ("California courts consider "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."); *Richmond v. Dart Indus.* (1981) 29 Cal. 3d 463; *Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715. Second, by invalidating long-accepted forms of class-wide proof, *Duran* essentially assures that no class certification will be possible in the future. Yet statistical sampling, surveys, and other representative evidence have long been accepted as a means of proving liability or damages. *See, e.g., Sav-On, supra*; *Bell, supra*; *Brinker Restaurant Corp. v. Superior Court*, --- P.3d ----, 2012 WL 1216356, at *3, 13 (Cal. 2012) (upholding class decision based on common proof which included survey evidence); *Marler v. E.M. Johansing, LLC*, (2011) 199 Cal. App. 4th 1450, 1465 (mobile home class' use of survey forms accepted to demonstrate reliance in fraud suit).

This new standard for evaluating class certification and proofs would gut the class action device and strip consumers and workers of the right to resolve issues collectively which, in many cases, determines whether the issues will be resolved at all. *Carnegie v. Household Int'l., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). Rejecting traditional and long-accepted means of common proof would especially impact worker, consumer, and indirect-purchaser antitrust class actions where surveys and sampling are often used by experts to not only opine on liability, but materiality, reliance and damages. The consequences of such an onerous standard would be real, widespread and potentially disastrous. Rather than having continued vitality as an important and effective procedural tool for prosecuting aggregate litigation, the class action device would be available to few, if any, to address corporate wrongdoing. It is hardly controversial that significant obstacles to prosecuting individual claims exist and, without class actions, thousands of injuries would go without redress. In both the marketplace and the workplace, individuals often do not know about or understand the ways in which their rights are being violated. They may lack education or face language barriers. They may not be able to comprehend complex provisions in the dozens of consumer contracts they are forced to sign, or know when their employer is required to pay them overtime compensation. When the economic loss is small, "it is less likely to be recognized by those affected." Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 68 (Rand Inst. for Civil Justice 2000).

Even if individuals understand that their rights are being violated, the lack of access to lawyers and to the courts, the complexity of the legal system, the time and resources pursuing a legal claim can take, and the relatively small size of their claims all operate as barriers that make it extremely difficult for an individual to obtain relief for individual injuries in the absence of class actions. This is particularly the case in these difficult economic times, when cash-strapped government agencies and public prosecutors do not have the capacity to take on enforcement actions. "[I]n practice, public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations." Hensler et al., *Class Action Dilemmas* 69. For example, in 2009, the Consumer Sentinel Network, an online database of consumer complaints made to the Federal trade Commission (FTC), Better Business Bureaus, and other agencies and organizations, received more than 1.3 million consumer complaints – over 720,000 fraud-related. FTC, *Consumer Sentinel Network Data Book for Jan. - Dec. 2009*, at 3 & 5 (Feb. 2010), http://www.ftc.gov/sentinel/reports/sentinel-annual reports/sentinelcy2009.pdf. The FTC, with its staff of a mere 1,100 employees, *see* FTC, *Performance and Accountability Report*, at III (2009), http://www.ftc.gov/opp/gpra/ 2009parreport.pdf, lacks the resources to investigate and respond to this volume of complaints, and so it depends on supplemental private enforcement. *See* FTC's Thomas B. Leary Addresses Class Action Litigation Summit (2003) ("The Federal Trade Commission is a relatively small agency with broad competition and consumer protection responsibilities, ... We depend on private litigation to supplement our efforts, and, therefore, we have a direct interest in the way that class actions are administered."), http://www.ftc.gov/opa/2003/06/learyspeech.shtm; *see also* Hensler et al., *Class Action Dilemmas* 69-70 (citing examples of regulatory agencies explicitly relying on private actions to augment their efforts).

Pursuing aggregated claims through class action litigation allows comprehensive relief for widespread harms. As one district court observed in certifying a class action: "This is precisely the kind of case that class actions were designed for, with small or statutory damages brought by impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant." *Van Jackson v. Check 'N Go of Ill., Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000). Without a class action, that defendant "might get away with piecemeal highway robbery by committing many small violations that were not worth the time and effort of individual plaintiffs to redress or were beyond their ability or resources to remedy." *Id.* Aggregate litigation also levels the playing field by enabling plaintiffs "to exploit the 'economies of scale' the defendant already naturally enjoys from treating separate claims as a single litigation unit." Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1383 (2000). Because class counsel "can spread their investment over all of the claims – just as the defendant does – it becomes possible to make investments in the litigation that the plaintiffs could not make if the claims were prosecuted separately." *Id.* at 1380-81; *see Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 614 (C.D. Cal. 2005) (class members "would face an enormous balance of resources if they were to take on the largest Chinese language newspaper in North America on an individual basis").

CONCLUSION

For these reasons, the NCL respectfully requests this Court to grant the Petition for Review filed in this matter by Petitioners Sam Duran, *et al.*

Sally Greenberg
Executive Director
National Consumers League