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April 2, 2012

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, California 94102

Re: *Sam Duran, et al. v. U.S. Bank National Association*
California Supreme Court Case No. S200923

Dear Chief Justice Cantil-Sakauye and Associate Justices:

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

I. The Applicant's Interest.

On November 25, 2009, Michael Hodge ("Hodge") – acting individually, and on behalf of similarly situated current and former employees in California – filed a putative wage and hour class action lawsuit in Superior Court in Sacramento against his former employer, T&S Business Corporation ("T&S"), a franchisee of "International House of Pancakes" or "IHOP" restaurants. In that lawsuit, Hodge alleged that for several years T&S has operated with a policy of impermissibly deducting money from minimum wages paid to scores of its employees under the guise of a "meal" policy, resulting in wide-spread minimum wage violations. Hodge contends that T&S's practice violates a myriad of Labor Code sections, as well as the California Code of Regulations provisions also known as California Industrial Welfare Commission Wage Order No. 5-2001 (Cal. Code Regs., tit. 8, section 11050). T&S answered Hodge's lawsuit. While admitting to implementing a standardized meal deduction policy as to its minimum wage workers – and having produced to Hodge over 200 signed meal deduction authorization forms signed by its employees – T&S claims that its policy is not unlawful.

On January 20, 2012, pursuant to a Case Management Order, Hodge filed a Motion for Class Certification. Hodge's motion sets forth the factual and legal bases establishing that a class should be certified to include all individuals who have worked for T&S in California on and after July 1, 2006, who were paid the California minimum wage for hours worked in a day and were subject to T&S's meal deduction plan. Pursuant to Case Management Orders, on February 22, 2012, T&S's opposition was due.

On February 6, 2012, however, *Duran* was published. T&S seized upon the *Duran* holding as the centerpiece to its opposition to class certification, arguing that *Duran* compels denial of class certification in virtually any wage and hour case because: individualized inquiries are required when an employer's policy is properly applied to some employees, but not others; and where there is discretion about how an employer's policy is implemented, and how employees follow it, class treatment is inappropriate.

T&S also argued *Duran* compels denial of class certification based on its sweeping proposition that statistical, survey, and/or sampling evidence can never establish liability, and that without individualized inquiries about liability and damages a defendant is denied due process. Hodge suggested in his class certification moving papers that statistical, survey, and/or sampling evidence might be useful in managing the case at trial, which T&S turned around in its opposition to argue that *Duran* now essentially forbids.

Hodge filed a reply to T&S's opposition on March 8, 2012. The matter is set for a hearing on May 25, 2012. Therefore, Petitioners' request for review by this Court, and its timely decision on that Petition is of tremendous significance to Hodge and the hundreds of workers he seeks to represent. Indeed, the interests of millions of California workers are at stake. The extent to which employees can protect and advance their interests in class actions, particularly where employers flaunt the law and then seek to hide behind a cloak of due process, is directly undermined by the manner in which *Duran* seeks to reshape a trial court's view of class treatment as well-established by this Court.

II. Why Review Should Be Granted.

Petitioners correctly state that review should be granted because *Duran* openly challenges the previously well-established rule that when common questions of law or fact predominate, class certification is proper. Instead, *Duran* attempts to set a new standard which compels denial of class treatment when there exist *any* questions of individual fact or law. Further, and as Petitioners also articulate, the implications that class liability can never be established by statistical sampling and/or other representative evidence as *Duran* announces, is a drastic overreaction to the use of one trial court's allegedly flawed trial plan. And third, because the *Duran* court went so far as to

decertify a class after trial, rather than refer the matter back to the trial court, the appellate court exceeded its authority as mandated by this Court with an unprecedented invasion of the trial court's role to be procedurally innovative in managing class actions. Accordingly, for those fundamental reasons, Hodge urges this Court to review *Duran*.

III. *Duran* Overreaches by Reversing the Predominance Test Established by this Court

California public policy encourages the class action device. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340; *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 973.) The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440).)

To sustain any class action, there must be: (1) an ascertainable class; and (2) a well-defined community of interest in the questions of law or fact affecting the putative class. (*Sav-On, supra,* 34 Cal.4th at p. 326, citing *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104; see also, *Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695, 704.) "The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who will adequately represent the class." (*Sav-On*, *supra*, 34 Cal.4th at p. 326.) To establish commonality, a plaintiff need not prove the precise amount of damages, and variations on the amount of damages to be recovered by the individual class members are not a bar to class treatment. (*Id.*, at p. 332, citing *Collins v. Rocha* (1972) 7 Cal.3d 232, 238 [that calculation of individual damages may at some point be required does not foreclose the possibility of taking common evidence on the questions of liability].) In certification proceedings, California courts have considered "pattern and practice evidence . . . and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Sav-On*, *supra*, 34 Cal.4th at p. 333.)

In *Duran*, the trial court allegedly selected an inadequate sample group of class members to testify at trial as to liability and damages, and then imputed those results to the entire class. The appellate court found error in that approach because, it claimed, the sample size was not sufficient, depriving the defendant of certain due process rights. But, the Court of Appeal's decision did not stop there. *Duran* implies that, as a pre-requisite to certification in the first instance, a plaintiff must now demonstrate violations of the laws at issue in a case as to each potential class member, which would effectively reverse the burden of proof in wage-and-hour matters where the employer is obligated to maintain proper records. (See, Lab. Code § 226; Cal. Code Regs., tit. 8, section 11050, ¶7; see also, *Sav-On*, *supra*, 34 Cal.4th 319, 338.) *Duran* also suggests a new rule that statistics, surveys, and other forms of representative evidence may not be used to establish

classwide liability in a case where a defendant might be able to avoid liability to some class members through individualized proof; so read, however, *Duran* would be contrary to *Sav-On*, and similar cases cited above.

This Court has consistently commanded that a common recovery is *not* required in order to establish a community of interest. (*Daar, supra,* 67 Cal.2d at p. 707.) In fact, earlier, in *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, the same appellate court had opined "most class actions contemplate individual proof of damages, which necessarily entails the possibility that some class members will fail to prove damages." (*Bell, supra,* 115 Cal.App.4th at p. 744, citing *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1354.) And in *Hypolite v. Carleson* (1975) 52 Cal.App.3d 566, 579-581, for example, the court held that the need to calculate wrongfully denied benefits individually does not defeat community of interest where class members allege claims based on the same invalid company regulations. Yet, *Duran* holds that an employer, even without proper records, should have the right to examine each individual class member on issues of liability and damages, or no class should be permitted to exist. It is, as a result, a ruling inconsistent with well-settled law on the subject of class certification.

"For decades '[t]his court has urged trial courts to be procedurally innovative' [citation] in managing class actions, and 'the trial court has an obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class' [citations]." (*Sav-On, supra,* 34 Cal.4th at p. 339.) In *Sav-On*, this Court also reminded that courts have considered ". . . statistical evidence, sampling evidence, [and] expert testimony . . . in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Sav-On,* 34 Cal.4th at p. 333.) And, in *Bell*, the court approved of the use of representative testimony and statistical extrapolation admitted to establish liability and damages, where 9% of the class worked no overtime at all. (*Bell, supra,* 115 Cal.App.4th at p. 750.) Although *Duran* concedes the application of *Sav-On* and *Bell* remain intact, its holding that statistical evidence undermines a defendant's due process is irreconcilable with prior case law.

Duran should have held that surveys, statistics, and representative evidence are admissible to establish classwide liability – either alone or in conjunction with other evidence – as long as that evidence is statistically valid. If evidence is statistically valid, there is no reason it cannot be used to establish classwide liability in an appropriate case, where the nature of the employer's challenged practices and policies are such that classwide rather than individualized issues predominate – a discretionary determination that, in the first instance, is for the trial court to make. (*See, e.g., Sav-on,* 34 Cal.4th at 334 ["even if some individualized proof of such facts ultimately is required to parse class members' claims, that such will predominate in the action does not necessarily follow . . . . Individual issues do not render class certification inappropriate so long

as such issues may effectively be managed"; "the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate."])

IV. Conclusion.

When common questions of law or fact exist, and predominate over individual issues, that should lead a court to enter an appropriate class certification order. Further, when common proof clarifies liability, differing amount of damages owed do not bar trial of individual claims in the class context. Finally, the introduction of reliable expert evidence does not deprive a defendant of due process rights. These are the long-standing pillars of class action principles in California which are undermined by *Duran*.

Duran subverts decades of case law regarding the proper test for class treatment in actions affecting hundreds or even thousands of disenfranchised workers, and splinters from the foundations laid by this Court about the proper role of an appellate court in reviewing a trial court's rulings. It threatens to unwind the fabric of case law that guides lower courts. Maintaining uniformity, and providing direction to the lower courts are a necessity, and *Duran* must be reviewed by this Court to fulfil those purposes.

Therefore, Hodge respectfully requests this Court to grant the Petition for Review filed in this matter by Petitioners, Sam Duran, *et al.*

Respectfully submitted,

POPE, BERGER & WILLIAMS, LLP

Timothy G. Williams
Stephanie Reynolds

TGW:

cc: Courts/Counsel of Record

CERTIFICATE OF SERVICE
(C.C.P. Section 1013A and 2015.5)

I, Sheri B. Alcaraz, declare that I am a citizen of the United States, over 18 years of age, and not a party to the within lawsuit. My business address is 3555 Fifth Avenue, Suite 300, San Diego, California 92103. Upon this day, I served the following document(s):

April 2, 2012, Amicus letter brief to the California Supreme Court
Sam Duran, et al. v. U.S. Bank National Association
California Supreme Court Case No. S200923

on the following party(s) by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

Overnite Express/Norco Delivery: I caused said documents to be deposited in a box regularly maintained by Overnite Express/Norco Delivery located at 3555 Fifth Avenue, San Diego, California 92103, in an envelope designated by Overnite Express/Norco Delivery with delivery fees paid for on April 3, 2012 for next business day delivery.

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I declare under penalty of perjury under the laws of the State of California that he foregoing is true and correct. Executed on April 3, 2012, at San Diego, California.

Sheri B. Alcaraz