RAM, OLSON, CEREGHINO & KOPCZYNSKI LLP
ATTORNEYS

May 1, 2012

BY HAND DELIVERY

The Hon. Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Duran, et al. v. U.S. Bank, N.A.*
Supreme Court of California Case No. S200923
Court of Appeal, First District, Case Nos. A125557 and A126827
Alameda County Superior Court Case No. 2001-035537

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We write to you on behalf of our clients, Timothy McAdams and the certified UCL and CLRA classes he represents in *McAdams v. Monier* (2010) 182 Cal.App.4th 174 ("McAdams *amici*"), in support of the Petition for Review filed by Sam Duran and Michael Fitzsimmons ("Petitioners").

I. INTEREST OF AMICI (RULE 8.500(g))

Timothy McAdams is the appointed class representative in the certified class action entitled *McAdams, et al. v. Monier, Inc.*, Placer County Superior Court Case No. SVC 16410. Mr. McAdams represents UCL and CLRA classes of California homeowners who own structures with Monier slurry coated roofing tiles that were installed between January 1, 1978 and August 14, 1997. The Third District Court of Appeal has twice ruled that the classes should be certified for California Unfair Competition Law ("UCL") and Consumers Legal Remedies Act ("CLRA") claims. (*McAdams v. Monier, Inc.* (2007) 151 Cal.App.4th 667, as mod. on den. of rehg.; *McAdams v. Monier* (2010) 182 Cal.App.4th 174.) In the *McAdams* case, the defendant, Monier, served a notice to appear requesting that all of approximately 160,000 absent class members appear at trial. Prior to *Duran*, the trial court quashed the notice and ruled that Monier could call a reasonable number of absent class members to testify at trial. Relying to a great extent on *Duran,* Monier is moving to exclude the classes' statistical expert from testifying at the October 9, 2012 trial.

II. *DURAN* IS INCONSISTENT WITH PRIOR DECISIONS OF CALIFORNIA COURTS CONCERNING THE USE OF STATISTICAL EVIDENCE IN CLASS ACTIONS.

"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." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 333.) In *Sav-On,* the Court observed that the "trial court has an obligation to consider the use of ... innovative procedural tools proposed by a party to certify a manageable class." (*Id.* at 339-40)

One of the tools often used in the class context is statistical analysis. "Underlying the contemporary reliance on the methodology of inferential statistics is a recognition that '[e]xperts have developed appropriate modeling techniques for reaching statistically significant and reliable conclusions.'" (*Bell v. Farmers Ins. Exchg.* (2004) 115 Cal.App.4th 715, 754 ["*Bell III*"].) In *Bell III* the court stated: "The reliability of an estimate subject to a large margin of error might conceivably be bolstered by evidence of a high response rate, probable distribution within the margin of error, absence of measurement error, or other matters." (*Bell III, supra,* 115 Cal.App.4th 715, 756.) Indeed, many California litigants have resorted to statistics to meet their burden of proof. (*See Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106-08 ["well sampling and other hydrological data" about "the pattern and degree of contamination" could support "a theory that a defendant's negligence has necessitated increased or different monitoring for all, or nearly all, exposed individuals"]; *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1279 [certifying class action for wrongfully denied welfare benefits because "whether the County applied an unlawful sanctioning process" could be based on evidence that included "a sampling of representative cases"]; *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 421 [finding class action commonality satisfied with statistical data and analysis of retail chain's corporate structure supporting allegations respecting centralized control over employment decisions].)

These and other California cases establish that statistics, surveys, and representative evidence are appropriate forms of proof in class actions, if properly presented. (*Sav-On*, 34 Cal.4th at 334.) Indeed, Justice Werdegar, in her concurrence to the *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 opinion,

emphasized "our historic endorsement of a variety of methods that render collective actions judicially manageable." (*Brinker*, 53 Cal.4th at *94.)

> Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability. (*See, e.g., Bell v. Farmers Ins. Exchange (2004) 115 Cal.App.4th 715, 749-755 [9 Cal. Rptr. 3d 544]* [upholding as consistent with due process the use of surveys and statistical analysis to measure a defendant's aggregate liability under the IWC's wage orders]; *Dilts v. Penske Logistics, LLC (S.D.Cal. 2010) 267 F.R.D. 625, 638* [certifying a meal break subclass because liability could be established through employer records and representative testimony, and class damages could be established through statistical sampling and selective direct evidence]; see generally *Sav-On, at p. 333 & fn. 6*).

(*Brinker*, 53 Cal. 4th at *99 [Werdegar, J., concurring].)

The *Duran* court held, among other things, that statistics could not be used to prove liability under the circumstances presented by *Duran*. (*See Duran*, 203 Cal.App.4th at 256, 258, 265 fn.72, 268.) To reach that conclusion, the *Duran* court erroneously characterized *Bell III* as using statistics to analyze damages only. While it is true that statistics were not used in *Bell III* to prove that the defendant insurer had *misclassified* its claims representatives as exempt, misclassification in and of itself is not actionable. One must also show that overtime hours were worked. The *Bell III* plaintiffs used statistics to prove this final element of their claim through a statistically validated analysis of randomly sampled class members' testimony, which established that 91% of the class worked some overtime. (*See* 115 Cal.App.4th at 743-44.) "The question of an employee's 'eligibility for recovery' . . . depended on the same factual showing – unpaid overtime hours worked . . ."[1] (*Id.*) Because the evidence showed that 9% of the class worked no overtime, the defendant had no liability towards that 9%, a result reached through the extrapolation of data from representative testimony.

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[1] While the *Bell III* court referred to this proof as "damages," it recognized that eligibility for damages required proof of having to work overtime – really an element of the claim. (*Bell III*, 115 Cal.App.4th at 743-44.)

Monier now argues that the *Duran* opinion categorically prohibits class-wide statistical proof. McAdams *amici* respectfully submit that review is appropriate to address the role of statistical analysis in the class action context.

III. CONCLUSION

McAdams *amici* respectfully request that this Court grant review and clarify how and when statistics may be used in class actions.

Respectfully submitted,

Michael F. Ram

cc: All Counsel (see attached Service List)

PROOF OF SERVICE

Duran, et al. v. U.S. Bank, N.A.
Supreme Court of California Case No. S200923

I, Ann Williams, state:

I am a citizen of the United States. My business address is 555 Montgomery Street, Suite 820, San Francisco, CA 94111. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served the foregoing document described as:

[AMICUS] LETTER TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND ASSOCIATES JUSTICES

on the following person(s) in this action 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 and that this declaration was executed on May 1, 2012 at San Francisco, California.

Ann Williams