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April 17, 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:

In compliance with California Rule of Court 8.500, subd. (g), William A. Kershaw respectfully submits this letter to support the Petition for Review filed on March 19, 2012, in the case of *Sam Duran, et al. v. U.S. Bank National Association* (2012) 203 Cal.App.4th 212 ("*Duran*"), *Sam Duran, et al.*

I. The Applicant's Interest.

I am an attorney in Sacramento, California and am actively involved in several class actions where I represent California employees who have been improperly denied overtime compensation. The decision in *Duran* will have a substantial impact on my practice and the interests of the thousands of employees I represent. Given that this decision deviates from well settled class certification law, it should be reviewed by the Court as it will undoubtedly impact the interests of my clients.

II. Why Review Should Be Granted.

Review should be granted in this case because *Duran* contradicts the well-established rule that liability in a class action can be established through statistical sampling and/or other representative evidence. The decision in *Duran* is also inconsistent with the deference that trial courts should be given with respect to class certification.

III. The Court In Duran Ignored The Predominance Test Established by this Court

For purpose of determining whether common issues predominate, it is well settled that a court may consider “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 court departed from this well established principle. Specifically, the court found that the statistical sampling used by the trial court to establish that class members were exempt employees was not statistically valid. However, rather than remand the case to the trial court for reconsideration of this issue, the court went much further. It adopted a uniform rule that statistical sampling can *never* be used to establish class wide liability in a misclassification case if there is any a possibility that even a single class member’s claim is subject to individualized proof. For example, under the court’s reasoning in *Duran*, statistically valid sampling showing that 99% of a class is misclassified as exempt would be insufficient to show predominance. Rather, the class could not be certified because the defendant would have a “due process” right to assert its affirmative defense with respect to the 1% of the class that is theoretically not exempt.

Such a rule flies in the face of the well settled principal that a common recovery is *not* required in order to establish a community of interest. (*Daar, supra*, 67 Cal.2d at p. 707.) A community of interest sufficient to satisfy due process can be found even when some class members have no damages at all, as long as there are uniform policies and procedures that impact that class equally. See *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715 (“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.) Additionally, in *Sav-On*, this Court noted that “... statistical evidence, sampling evidence, [and] expert testimony ... [may be used] in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.” (*Sav-On*, 34 Cal.4th at p. 333.)

For decades, courts have used statistical sampling to establish class wide liability. While the court in *Duran* may have determined that the statistical sampling used by the trial court was not statistically valid, it should not have adopted a uniform policy that such evidence can *never* be used to establish classwide liability. If such were the rule, employers would be given the unfettered ability to adopt uniform policies and procedures that improperly deny overtime to employees so long as individualized testimony is

required to prove the claim of even a single employee. Such a result is entirely inconsistent with the state's policy of encouraging the class action mechanism to vindicate the rights of employees.

IV. Conclusion.

When common questions of law or fact predominate over individual issues, a proposed class should be certified. It has long been the law in California that such common issues of law or fact can be established through statistically valid, scientific evidence. *Duran* ignores this well settled law and places into chaos the standards that trial courts should use for purposes of determining whether a class should be certified in cases brought by misclassified employees. Therefore, I, on behalf of myself and the clients I represent, respectfully request that the Court grant the Petition for Review filed in this matter by Petitioners, Sam Duran, *et al.*

Respectfully submitted,

KERSHAW, CUTTER & RATINOFF, LLP



William A. Kershaw

WAK

cc: Courts/Counsel of Record

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

I, Lisa C. Anderson, 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 401 Watt Avenue, Sacramento, CA 95864. Upon this day, I served the following document(s):

April 17, 2012, Amicus letter brief to the California Supreme Court
Sam Duran, et al. v. U.S. Bank National Association
California Supremed Court Case No. S200923

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

U.S. Mail: By placing said document(s) in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

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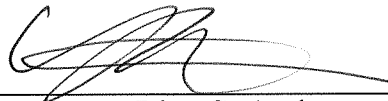
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 17, 2012, at Sacramento, California.



Lisa C. Anderson