

LAW OFFICES OF
KEVIN T. BARNES

KEVIN T. BARNES
GREGG LANDER

—
OF COUNSEL:
JOSEPH ANTONELLI

5670 WILSHIRE BOULEVARD, SUITE 1460
LOS ANGELES, CALIFORNIA 90036-5664

TELEPHONE: (323) 549-9100
TOLL-FREE: (877) 309-3577 / FAX: (323) 549-0101

A PROFESSIONAL LAW CORPORATION

—
WWW.KBARNES.COM

—
BARNES@KBARNES.COM

April 24, 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 Cantil-Sakauye and Honorable Associate Justices:

Pursuant to California Rules of Court Rule 8.500(g), The Law Offices of Kevin T. Barnes and Law Office of Joseph Antonelli respectfully writes in support of the Plaintiffs' March 19, 2012 Petition for Review in the above referenced matter (hereafter, "*Duran*"). This Court has the opportunity in *Duran* to address important issues generally regarding California class action procedures and specifically regarding statewide wage and hour litigation.

The Law Offices of Kevin T. Barnes and Law Office of Joseph Antonelli have represented employees and consumers in wage and hour and consumer class action cases since 1997. We have represented hundreds of thousands of employees in numerous class action cases in both state and federal court. We brought to trial Mutuc v. Huntington Memorial Hospital, LASC Case No. BC288727, one of very few wage and hour class action cases tried in Los Angeles County Superior Court, which resulted in a Statement of Decision awarding the class members restitution in the amount of \$32,857,014.83. Of key importance to our firms is the fact that, since *Duran* was published, we have already felt its effects, with defendants' counsel citing this case as the death knell of class action litigation in California.

We agree with Petitioners that review should be granted here. First, *Duran* aggressively challenges previously well-established class certification rules and sets a new standard that requires trial courts to deny certification if there are any individual questions of fact or law. Second, *Duran*'s suggestion that class liability can never be established by representative evidence and statistical sampling appears an excessive reaction to a single trial court's purportedly faulty trial plan and a condemnation of that trial court's attempt to utilize procedurally innovative tools to manage class actions, as this Court has urged trial courts to do. For these reasons, review of this decision is necessary and justified.

In *Duran*, the trial court selected a sample group of class members for trial testimony regarding liability and damages, and then imputed those results to the entire class. In the process, it appears that the *Duran* court labored to ensure class certification denial, by requiring that an

individualized determination of each exemption defense raised by the employer was necessary for every class member. For all practical purposes, this holding reverses the burden of proof in wage and hour litigation.

Duran seems to reject the long-accepted premise of class action certification in California that it is not necessary to establish that there are no factual differences between class members. See *Sav-On, supra*, 34 Cal.4th at 332-340 [class certification is appropriate if there is evidence of widespread de facto labor violations even though there might be some factual differences between class members]; *Richmond, supra*, 29 Cal.3d 462 [class treatment appropriate despite hostility by part of putative class]; *Bell v. Farmers Insur. Exchange* (2004) 115 Cal.App.4th 715 [fact that 9% of class had no claim for overtime does not preclude class certification].

Next, *Duran* suggests a new rule that statistical sampling, surveys and other forms of representative evidence may not be used to establish classwide liability. If this assertion is accepted in California class action litigation, it could wreak havoc in class action cases. "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 339. While *Duran* reluctantly concedes that *Sav-On* remains intact, at the same time the case holds that representative evidence undermines defendants' due process rights.

However, the statistical and representative evidence rejected by *Duran* was expressly and favorably encouraged by this Court in *Sav-On, supra*, 34 Cal.4th at 333: "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 makes class certification appropriate." It is clearly necessary for the California Supreme Court to grant review here to ensure that *Duran* does not drastically change the class action rules in California, to the great detriment of the state's workforce.

Duran should be reviewed to ensure that surveys, statistics and representative evidence are admissible to establish classwide liability, alone or in conjunction with other evidence. Plaintiffs should be encouraged to use statistically valid evidence to establish classwide liability in appropriate cases. As the Petition for Review more fully advises the Court, the *Duran* Opinion, if accepted by other courts, fundamentally changes the landscape of class action wage and hour litigation, imposing standards of proof at both the class certification stage and trial stage which contradict this Court's previous and well-reasoned authority. As such, The Law Offices of Kevin T. Barnes and the Law Office of Joseph Antonelli vigorously request and encourage this Court to grant review in this case.

Respectfully,



Kevin T. Barnes
Gregg Lander
Joseph Antonelli
Janelle Carney

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, am over the age of 18 years and not a party to this action. My business address is 5670 Wilshire Boulevard, Suite 1460, Los Angeles, CA 90036-5664, which is located in Los Angeles County, where the service herein occurred.

On the date of execution hereof, I caused to be served the following attached document/s:

Letter to Honorable Chief Justice Tani Cantil-Sakauye And Honorable Associate Justices regarding *Sam Duran, et al. v. U.S. Bank National Association, California Supreme Court Case No. S200923*

on the interested parties in this action, addressed as follows:

Attorneys for Sam Duran:

Edward J. Wynne, Esq.
WYNNE LAW FIRM
100 Drakes Landing Road, Suite 275
Greenbrae, CA 94904

Ellen Lake, Esq.
LAW OFFICES OF ELLEN LAKE
4230 Lakeshore Avenue
Oakland, CA 94610

Attorneys for U.S. Bank National Association:

Timothy Freudenberger, Esq.
Alison Tsao, Esq.
Kent Sprinkle, Esq.
CAROTHERS DISANTE &
FREUDENBERGER LLP
601 Montgomery Street, Suite 50
San Francisco, CA 94111

Court of Appeal (1st District, Division 1)
1st District Court of Appeal
350 McAllister Street
San Francisco, CA 94102-7421

Clerk of the Court
Alameda Superior Court
(Honorable Robert Freedman)
1221 Oak Street, Department 20
Oakland, CA 94612

Office of the Attorney General
455 Golden Gate, Suite 11000
San Francisco, CA 94102-7004

using the following service method(s):

X **VIA MAIL:** I caused the document(s) to be served to be deposited at: **5670 Wilshire Boulevard, Los Angeles, CA**, which is a mailbox or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person(s) on whom the document(s) is/are to be served, at the office address as last given by that/those person(s), otherwise at that/those person(s)' place(s) of residence. I am aware that on motion of any party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing stated herein.

I DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on **April 24, 2012**, at Los Angeles, California.



Cindy Rivas