

LEONARD CARDER, LLP

SHAWN GROFF
KATE R. HALLWARD
ESTELLE PAE HUERTA
CHRISTINE S. HWANG
AARON D. KAUFMANN
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JENNIFER LAI
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ISAAC S. NICHOLSON
DAVID POGREL
ROBERT REMAR
MARGOT A. ROSENBERG
BETH A. ROSS
MATTHEW D. ROSS
PETER W. SALTZMAN
PHIL A THOMAS

ATTORNEYS
1330 BROADWAY, SUITE 1450
OAKLAND, CA 94612

TELEPHONE: (510) 272-0169
FAX (510) 272-0174
www.leonardcarder.com

NORMAN LEONARD
(1914 - 2006)

OF COUNSEL

WILLIAM H. CARDER
VICTORIA CHIN
LYNN ROSSMAN FARIS
SANFORD N. NATHAN
RICHARD S. ZUCKERMAN

SAN FRANCISCO OFFICE
1188 FRANKLIN ST., SUITE 201
SAN FRANCISCO, CA 94109
TELEPHONE: (415) 771-6400
FAX: (415) 771-7010

REFER TO OUR FILE NO.

May 2, 2012

VIA UPS NEXT DAY AIR

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

Re: Duran v. U. S. Bank National Association, No. S200923
Amicus Curiae Letter (Cal. Rule of Court 8.500(g))

Honorable Justices:

I write on behalf of this law firm and the labor unions and workers that this firm represents, to urge the Court to accept review of the above referenced *Duran* decision and prevent it from undermining the ability of workers and consumers to seek redress for violations of law that can only be meaningfully remedied through the tried and true procedure of a class action.

I. Statement of Interest

This firm and its clients have an urgent interest in the issues presented by this petition for review because, as explained further below, our ability to effectively represent our clients will be severely jeopardized by the Court of Appeal's *Duran* decision if it is allowed to stand.

II. Discussion

This firm, through its former and present attorneys has represented labor unions and their members since the 1930's, including the International Longshore & Warehouse Union

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(ILWU) and its President Harry Bridges, and the United Farm Workers (UFW) and its president Cesar Chavez. This firm continues to represent the ILWU, and many other labor unions, including local unions of Unite HERE, Amalgamated Transit Union (ATU), International Brotherhood of Electrical Workers (IBEW), International Federation of Professional & Technical Employees (IFPTE), University Professional & Technical Employees (UPTE), University Counsel-American Federation of Teachers (UC-AFT), International Union of Elevator Constructors (IUEC), to name just a few.

Attorneys in our firm have also represented - and continue to represent -- countless workers in class action litigation counsel to vindicate their statutory rights under the California Labor Code and the Industrial Welfare Commission's Wage Orders. A substantial portion of our class action practice includes representing employees who, like Sam Duran in the case at issue here, have been misclassified as exempt from essential protections of the Labor Code and Wage Orders, including for example: *Roberts v. Best Buy* (Contra Costa Co. No. C02-01642); *Reid v. Extended Stay America*, (Alameda Co. No. 2992955285), *Gundersen v. Lennar Homes*, (N.D. Cal. Case No. CV-09-2270 CRB); *Hoenemier v. Sun Microsystems, Inc.*, (Santa Clara Co. No. 106CV-071531); *Clear Channel Broadcasting, Inc. v. Shellhammer*, (S.F. Co. No. CGC-04-431910); *Vasquez v. Bank of America, Inc.*, (Santa Barbara Co. Case No. 1168845); *O'Maley v. Intel Corp.*, (Santa Clara Co. Case No. 1-08-CV126813) and *Gondo v. Silver Cinemas, Inc.*, (Alameda Co. No. RG05211872).

We have also litigated -- and continue to litigate -- numerous class action challenges to treatment of employees misclassified as putative "independent contractors," including for example: *Vickery v. Cinema Seven, Inc.* (SF County ["Co."] Superior Court Superior Ct #959610, exotic dancers); *Kairy v. SuperShuttle Int'l, Inc.*, (N.D. Cal. No. 3:08-cv-2993-JSW, airport shuttle van drivers); *LaBrie v. UPS Supply Chain Solutions, Inc.* (N.D. Cal. 3:08-CV-03182-PJH, couriers); *Estrada v. FedEx Ground Packaging System, Inc.*, 154 Cal.App.4th 1 (2007)(delivery drivers); *In re FedEx Ground Package System, Inc. Employment Practices Litig.*, Case No. 03:05-MD-527 RM (MDL 1700) (N.D. Ind.)(same, co-lead counsel); *Narayan v. Eagle Global Logistics*, 616 F.3d 895 (9th Cir. 2010), couriers); *Keo v. North Coast Couriers, Inc.* (Alameda Co. Case No. RGO6251806, couriers) and *Samaniego v. Empire Today, LLC*, (Alameda County No. RG 10549294).

We have also litigated -- and continue to litigate -- class actions asserting other violations of the Labor Code and Wage orders, including for example: *Taylor v. PG&E* (S.F. Co. CGC-07-467956, travel time); *Gilmer v. AC Transit District* (Alameda Co. No. RG04170741, travel time); *Bartoni et al. v. American Medical Response, Inc. et al.*, (Alameda Co. No. RG08382130 (Judicial Council Coordination Proceeding No. 4604,

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meal breaks); *Barber v. U.S. Bank, N.A.*, (Contra Costa Co. No. C11-02173, expense reimbursement); *Escandon v. North Bay Corporation*, (Sonoma Co. No. 243883, meal breaks); *Watts v. Sysco Corp.*, (Alameda Co. No. RG09464228, expense reimbursement); *Saidel v. CBS Radio, Inc.*, (N.D. Cal. No. C07-2948 SC, expense reimbursement); *Burdick v. U.S. Foodservice, Inc.*, (Alameda Co. RG09434440, expense reimbursement); *Kielhurn v. Vistar Corporation*, (Alameda Co. RG10529045, expense reimbursement); *Gabriel v. Idearc Media, Inc.*, (Orange Co. No. 04 CC 00591, unlawful commission plan); *Gilbert v. Securitas Security Services U.S.A., Inc.*, (Riverside Co. No. 056957, vacation forfeiture); *Grazier v. Walgreens Company*, (Alameda Co. No. RG 05-0228473, meal periods) and *Schakow v. Lerner New York, Inc.*, (Contra Costa Co. No. C-08 01145, meal periods).

In the course of litigating these cases, we have learned -- especially outside the unionized workplace -- that in nearly every case the only effective means of securing the rights and protections of workers is through the class action mechanism provided by Code of Civil Procedure § 382. In the class action lawsuits noted above, the workers we represent have depended on this Court's teaching that:

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.

* * * * *

[C]ourts seeking to preserve efficiency and other benefits of class actions routinely fashion methods to manage individual questions. For decades "[t]his court has urged trial courts to be procedurally innovative (*San Jose [v. Superior Court* (1974)] 12 Cal.3d [447] at p. 453) 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' (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 653 . . .

Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 333, 339 & 340.

The redress we have secured for our clients in class action litigation is proof that this Court's observation about the benefits of class actions in the consumer context apply equally in the employment context: "consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights by mak[ing] it economically feasible to sue when individual claims are too small to justify the expense of

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litigation." *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473, quotations and citations omitted.

The Court of Appeal's decision in *Duran* flouts these fundamental principles in two respects, both of which threaten to undermine the viability of the class action procedure so zealously protected by this Court.

First, after acknowledging that trial court's class action trial plans are to be reviewed for abuse of discretion, the *Duran* decision failed utterly to give any deference to the trial court in its attempt to be "procedurally innovative" in managing the class action before it, choosing instead to give intense *de novo* review of every detail of the trial court's trial plan.

Second, the Court of Appeal's claim in *Duran* that "courts are generally skeptical of the use of representative sampling to determine liability" (203 Cal.App.4th at 258) flatly contradicts the teaching of this Court as quoted above. This broad categorical statement is particularly troubling in that it is not limited to the specific standard for evaluating white-collar exemption cases (such as *Duran*), where it is the employer's burden to show that employees classified as exempt are "primarily engaged" in exempt duties. *Sav-On*, 34 Cal.4th at 324, 338.

Duran will be surely cited -- improperly -- as authority for excluding *any* representative testimony to prove liability in *any* class action case. If allowed to stand, that proposition would eviscerate the class action procedure, and frustrate this "state[s] . . . public policy which encourages the use of the class action device." *Id.* at 340, quotation and citation omitted.

If left unreviewed and published the *Duran* decision poses grave threat to the continued vitality of the class action device as a means of "mak[ing] it economically feasible to sue when individual claims are too small to justify the expense of litigation." *Richmond* 29 Cal.3d at 473. Accordingly, this firm on behalf of its clients respectfully urges the Court to grant Plaintiffs' petition for review, or at least to order the decision depublished, pursuant to California Rule of Court 8.1105(e)(2).

Respectfully submitted

LEONARD CARDER, LLP

By:


Philip C. Monrad

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA.

I, the undersigned, declare that I am employed in the aforesaid County, State of California. I am over the age of 18 and not a party to the within action. My business address is 1330 Broadway, Suite 1450, Oakland, California, 94612. On May 2, 2012, I served upon the interested parties in this action the following document described as:

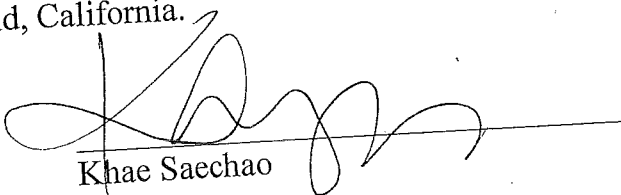
AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW

By placing a true and correct copy thereof enclosed in sealed envelopes addressed as stated on the attached service list for processing by the following method:

- BY REGULAR MAIL:** I am readily familiar with LEONARD CARDER, LLP's practice for collection and processing of correspondence and pleadings for mailing. Under that practice it would be deposited with the U. S. postal service on that same day with postage thereon fully prepaid at Oakland, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

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

Executed on May 2, 2012, at Oakland, California.


Khae Saechao

SERVICE LIST

<p><u>By U.S. Mail</u> Ellen Lake Law Offices of Ellen Lake 4230 Lakeshore Avenue Oakland, CA 94610-1136 <i>Counsel for Plaintiffs/Respondents, Sam Duran, Matt Fitzsimmons</i></p>	<p><u>By U.S. Mail</u> Clerk Alameda County Superior Court Rene C. Davidson Courthouse 1225 Fallon Street Oakland, CA 94612</p>
<p><u>By U.S. Mail</u> Edward J. Wynne J.E.B. Pickett Wynne Law Firm 100 Drakes Landing Road, Suite 275 Greenbrae, CA 94904 <i>Counsel for Plaintiffs/Respondents, Sam Duran, Matt Fitzsimmons</i></p>	<p><u>By U.S. Mail</u> California Court of Appeal First Appellate District, Division One 350 McAllister Street San Francisco, CA 94102</p>
<p><u>By U.S. Mail</u> Timothy Freudenberger Alison Tsao Kent Sprinkle Carothers, DiSante & Freudenberger 601 Montgomery Street, Suite 350 San Francisco, CA 94111-2603 <i>Counsel for Defendants and Appellant, U. S. Bank National Association</i></p>	<p><u>By U.S. Mail</u> Office of the Attorney General 455 Golden Gate, Suite 11000 San Francisco, CA 94102-7004</p>