**WASHINGTON LEGAL FOUNDATION**
**2009 Massachusetts Avenue, NW**
**Washington, DC 20036**
**202-588-0302**

July 14, 2012

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

**Re:** ***Prometheus Real Estate Group, Inc., et al. v. Superior Court for the State of California***
**Case No. S203324**
***Amicus Curiae* Letter of Washington Legal Foundation and Allied Educational Foundation**
**(Court of Appeal Case No. H037888, Sixth Appellate District)**

To the Chief Justice and Associate Justices:

The Washington Legal Foundation and the Allied Education Foundation hereby submit this letter as *amici curiae*, urging the Court to grant the petition for review filed by Petitioners Prometheus Real Estate Group, Inc. and Lick Mill Creek Apartments (collectively, "Prometheus"). Prometheus's petition sets forth several cogent reasons for reviewing the issues presented in this petition, including that the trial court provided no plausible explanation regarding why this case should be certified as a class action. WLF submits this brief to focus on one aspect of the case: the trial court applied improper legal standards in determining that common questions of fact and law predominated over individual questions.

Moreover, the Court recently granted review in a case that raises many of the same class certification issues raised by the Petition. *See Duran v. U.S. Bank National Assoc.*, No. S200934 (review granted May 16, 2012). At the very least, the Court should hold this Petition until it has had an opportunity to decide the issues raised in *Duran*.

In support of its motion to decertify the class, Prometheus provided substantial evidence – evidence that it did not obtain until after the class was initially certified – indicating that the ability of many or most of the class members to recover on any of the seven causes of action will turn on resolution of factual questions unique to individual class members. Such evidence provides strong support for Prometheus's argument that individual factual questions predominate over common questions – in which event this case cannot appropriately be tried as a class action.

The Superior Court did not attempt to provide a reasoned explanation regarding why it concluded that class treatment was appropriate with respect to any or all of the seven causes of action; it simply stated that "there's a commonality of claims." In the absence of any explanation of the legal standards the Superior Court applied in arriving at its legal conclusion, it

is impossible to know whether the court applied the correct legal standards. It would be inappropriate simply to *presume* that the court applied the correct standards. Appellate courts generally "review only the reasons given by the trial court" for its class certification ruling and "ignore any other grounds that might support" the ruling. (*Barthold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 829.) At the very least, therefore, this Court should grant the Petition and require the trial court to explain why the evidence produced by Prometheus does not require a conclusion that individual questions of fact predominate.

Moreover the evidence supplied by Prometheus strongly indicates that individual questions of fact do, indeed, predominate and thus that the Plaintiffs have failed to demonstrate the necessary "well-defined community of interest among class members." The arguments raised by Real Parties in Interest in their Answer to the Petition are based on a misunderstanding of relevant case law and fail to explain how any of their seven causes of action could be tried on a class-wide basis and still comply with due process requirements. Furthermore, although conceding that facts underlying the liability claims vary widely from plaintiff to plaintiff, the Real Parties in Interest contend that any manageability problems regarding the trial of such claims can be overcome through use of a "sampling" technique, whereby the nuisance and breach-of-covenant claims can be adjudicated by extrapolating an "average" amount of inconvenience an "objective" class member experienced – based on the experiences of a small sample of plaintiffs. Answer to Petition of Real Parties in Interest at 13. The U.S. Supreme Court, however, has called into question the constitutionality of any adjudicative technique that deprives the defendant of the right to contest liability to each class member, and has explicitly "disapprove[d]" use of such sampling techniques in federal court class actions. (*Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S. Ct. 2541, 2561.) In *Duran*, this Court will decide that same issue: whether California rules permit liability to be determined on a class-wide basis through "the use of representative testimony and statistical evidence" that is not specific to each plaintiff. (No. S200923.) Indeed, the Real Parties in Interest (hereinafter, "Plaintiffs") do not contest that this case cannot manageably be tried as a class action unless such short-cut methods of determining liability are permitted.

**Interests of *Amici Curiae***

WLF is a public-interest law and policy center located in Washington, D.C. with supporters in all 50 States, including many in California. WLF devotes a significant portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly appears before California courts and other State and federal courts in cases raising issues regarding certification of class actions. (*See,.e.g., Alcoser v. Thomas* (Cal. App. 2011) 2011 WL 537855, *cert. denied* (2012) 132 S. Ct. 518; *Conn. Retirement Plans & Trust Funds v. Amgen, Inc.* (9th Cir. 2011) 660 F.3d 1170, *cert. granted*

(U.S. June 11, 2012) __ U.S. __, 2012 WL 692771; *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S. Ct. 2541; *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429.)

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

WLF and AEF are concerned by the proliferation of class action lawsuits being filed in federal and state courts and the inhibiting effect that such suits can have on the development and expansion of business. WLF believes that the Superior Court's certification decision (and its denial of the decertification motion), if allowed to stand, will exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes. A decision to certify such a class is often outcome determinative, because it creates enormous pressure on defendants to settle the suit without regard to the underlying merits. *Amici* take no position regarding whether any class members possess meritorious claims against Petitioners; *amici* are insufficiently familiar with the factual record in this case to take such a position. Rather, their sole purpose in filing is to point out to the Court a variety of legal errors committed by the trial court in the course of certifying a plaintiff class and then refusing to decertify the class.

**Why Review Should Be Granted**

This Court should grant review to establish clear guidance to trial courts regarding their need to provide a reasoned explanation for granting or denying class certification motions. Trial courts should not be permitted to evade effective appellate review of their certification decisions by, as here, simply failing to specify why they believe a class is properly certified.

Plaintiffs' Answer to the Petition serves to reinforce Prometheus's contention that, had the trial court applied the proper legal standards, it would have concluded that certification was improper because common questions of fact and law do not predominate over individual questions. Plaintiffs concede that many of the claims of absent class members arise in factual settings that are materially different from those of other class members. *See, e.g.*, Answer to Petition at 9 (acknowledging evidence that class members "were each affected by the construction to different degrees"); *id.*. at 10 (acknowledging, with respect to fraud claims, evidence that class members received varying levels of information regarding the impending construction: "there are unnamed Class Members who similarly vary on the issue of who received and read post-Lease Addendum flyers and/or attended post-Lease Addendum informational meetings"); *id.*. at 12 ("Tenants never disputed the existence of individualized damage claims."). Yet, Plaintiffs fail to comprehend that these widespread factual differences among the claims of class members dictate a conclusion that individual questions of fact and law

predominate and thus that trying the case on a class-wide basis is wholly unmanageable and inappropriate.

**Predominance**

Class actions are authorized when there is a question of "common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court"; under those circumstances, "one or more may sue or defend for the benefit of all." (Code Civ. Proc., § 382.) While class actions "offer a means of avoiding repetitious litigation and a multiplicity of legal actions dealing with identical basic issues by greatly expediting the resolution of claims" (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715, 741), they have the potential to create injustice in individual cases. (*See, e.g., City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458 ("[C]lass actions may create injustice. The class action may deprive an absent class member of the opportunity to independently press his claim, preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right.").)

Class certification is appropriate where there is (1) a sufficiently numerous, ascertainable class; (2) a well-defined community of interest; and (3) proof that certification will provide substantial benefit to litigants and the courts, *i.e.*, proof that proceeding as a class is superior to other methods. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) In order to demonstrate "a well-defined community of interest," a party must show (1) common questions of law or fact predominate over individual questions of law or fact; (2) the class representatives have claims or defenses that are typical of the class; and (3) the class representatives can adequately represent the class. (*Id.*)

The Superior Court's ruling on the first of the three community-of-interest factors (predominant common questions of fact) warrant review by this Court. Whether common questions of fact predominate "hinges of whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022.) A trial court "must determine whether the elements necessary to establish liability are susceptible to common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." (*Id.* at 1024.) The Superior Court in this case undertook no such exercise; indeed, it did nothing that displayed any awareness of its responsibility to determine whether Plaintiffs' claims were "susceptible to common proof." Under those circumstances, the class certification decision cannot be sustained. (*See id*. at 1022 (a class certification order should be overturned if "it rests on improper criteria" or "on erroneous legal assumptions.").)

The evidence presented by Prometheus in connection with its motion to decertify the class – the accuracy of which is largely undisputed – demonstrates that this lawsuit cannot proceed as a class action because individual questions of fact predominate over common questions of fact. The Superior Court apparently concluded that class certification was appropriate simply because the putative class members share some common traits – they all resided in the same apartment complex, they all experienced life at the complex during significant construction activity, and they all signed leases with Prometheus that contained very similar lease terms. But that sort of commonality has very little to do with whether the factual questions whose resolution are critical to specific causes of action being asserted by Plaintiffs can be tried on a class-wide basis. The Superior Court failed to identify a single relevant factual question that can be resolved on a class-wide basis, and *amici*'s review of the causes of action being asserted suggests there are none.

**Claims Alleging Nuisance and Breach of the Covenant of Quiet Enjoyment**

With respect to the claims based on nuisance and breach of the covenant of quiet enjoyment (Counts 1 through 3), Prometheus's evidence demonstrated that the degree to which class members were affected by the 2008-2010 construction varied considerably. Such variations affect not only the damages to which a class member may be entitled but also whether there is any liability at all – because an interference with real property interests cannot constitute a nuisance or a breach of the covenant unless it is *substantial*. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 589 (a landlord does not breach the implied covenant of quiet enjoyment unless his action "substantially interfere[s]" with the tenant's use and enjoyment of the leased premises); *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938 (a nuisance cause of action requires a showing that interference with the plaintiff's use of his property was both substantial *and* unreasonable).)

The evidence indicates that some class members faced substantially less inconvenience during the construction period than did others. That wide variation is hardly unexpected in a case of this sort. Mansion Grove is a large apartment complex; it is spread out over more than 20 acres. Some tenants had construction going on right in front of their windows. Other tenants lived in units that were considerably farther from the construction. Some tenants temporarily lost parking spots; others did not. Because construction of the seven new buildings was staggered throughout the construction period, an individual tenant would have suffered lesser degrees of inconvenience when construction was occurring on new buildings that were more distant from his apartment, and greater degrees of inconvenience when construction began on nearby buildings (assuming that he was a tenant during that portion of the construction period). Accordingly, it would be impossible to determine on a class-wide basis that all Plaintiffs either did or did not suffer a "substantial" interference with the enjoyment of their property rights. In light of the significant variation in the conditions experienced by Manor Grove tenants, some

tenants may have suffered a "substantial" interference while others did not (and thus cannot establish liability under Counts 1 through 3). The only way for the Superior Court to make that determination is to consider the claims for nuisance and breach of the covenant of quiet enjoyment on a Plaintiff-by-Plaintiff basis. Under those circumstances, individual issues of fact predominate over common issue of fact, thereby rendering inappropriate a class-wide trial of Counts 1 through 3.

In their Answer to the Petition, Plaintiffs argued that individualized determinations regarding the degree of interference were unnecessary because the "substantial interference" standard is to be judged by an objective standard rather than a subjective standard. Answer at 14-20. Quoting from a decision that discussed the elements of a damages claim based on nuisance, Plaintiffs argued:

> The degree of harm is to be judged by an objective standard, *i.e.*, what effect would the invasion have on persons of normal health and sensibilities living in the same community? If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff might make it unendurable to him. This is, of course, a question of fact that turns on the circumstances of each case.

(*Id.* at 15 (quoting *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938-39.))

Plaintiffs' argument is based on a misunderstanding of the subjective-versus-objective distinction. *San Diego Gas & Electric* did, indeed, hold that the claims of any one plaintiff were to be judged on an objective basis – would a reasonable person in the situation faced by that individual plaintiff have deemed the interference with his real property interests to be "substantial?" But by referring to an "objective" standard, the Supreme Court did not endorse Plaintiffs' position – that when a defendant's actions inconvenience a large group of people, whether those actions constitute a "substantial" invasion of all those people's interests should be determined based on how a hypothetical person would have reacted had he been faced with an average amount of the inconvenience faced by the group as a whole. The Court was merely indicating that the "subjective" feelings of an individual plaintiff (who may be either more or less sensitive than average) are not determinative. Nothing in California case law suggests that Prometheus's liability to the class as a whole can be determined based on how an objective observer might view Prometheus's overall treatment of its tenants. Rather, any Plaintiff who seeks to recover under a nuisance or breach-of-the-covenant-of-quiet-enjoyment theory must demonstrate that the conditions that *he actually experienced* constituted a substantial interference (and, in the case of nuisance, also an unreasonable interference) with his property interests. In light of evidence that different Plaintiffs experienced substantially different conditions during

the construction period, a class-wide trial of these claims is unwarranted – because individual questions of fact predominate.

The First District's *Dolan* decision (which this Court has agreed to review) held that a trial judge may not overcome the deficiencies described above by resorting to sampling. *Dolan* involved a putative class of bank employees who claimed that they had improperly been classified as exempt from California's overtime laws. The trial judge certified the plaintiff class, even though the classification determination turned on a factual question that varied from plaintiff to plaintiff – if the employee spent a majority of his working hours outside the office, he was exempt from overtime laws, and if he spent a majority of his working hours inside the office, he was not exempt. The trial judge sought to overcome that problem (*i.e.*, the problem that individual questions of fact appeared to predominate) by adopting a trial plan that called for a trial of the claims of 20 randomly selected plaintiffs. After making post-trial findings that all 20 of those employees were not exempt from overtime laws, the trial court entered a class-wide factual finding that *every* class member was not exempt – and refused to permit the defendant to introduce evidence that individual class members spent most of their time outside the office and thus were, in fact, exempt employees. (*Duran*, 137 Cal.Rptr.3d at 411. ) The appeals court disapproved that sampling technique and held – in light of evidence that the relevant facts varied significantly from plaintiff to plaintiff – that the trial court abused its discretion in denying a motion to decertify the class. (*Id.* at 438-442.) The court explained that entry of class-wide findings based on findings derived from a small sample of plaintiffs is only permissible when calculating damages, not when determining liability. (*Id.* at 424.) The court determined that denying the defendant the right to introduce evidence that it was not liable to individual class members would violate its due process rights under the U.S. and California Constitutions. (*Id.* at 429-431.)[1]

In sum, if *Dolan* is good law, the predominance problems created by the wide variation in inconvenience suffered by Mansion Grove tenants cannot be overcome by a trial plan that focuses on the conditions faced by a small sampling of tenants. The class certification decision in this case with respect to Counts 1 through 3 cannot be reconciled with *Dolan* because unless sampling is used, individual questions of fact (*e.g.*, the degree to which each tenant was inconvenienced) will overwhelm common questions. In light of the irreconcilable conflict between the two decisions, the Court at the very least should hold this Petition and stay the trial until after it renders a decision in *Dolan*.

---

[1] In support of its conclusion, the court cited the U.S. Supreme Court's recent decision regarding federal court class actions, *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S. Ct. 2544, which "disapprove[d]" of efforts by class counsel to overcome deficiencies in commonality and predominance by applying on a classwide basis factual findings derived from a small sample of class members. (*Id.* at 429.)

**Claims Alleging Fraud and Negligent Misrepresentation**

With respect to the claims based on fraud and negligent misrepresentation (Counts 4 and 5), there is a similar predominance of individual questions of fact. There is no means by which the claims could be proven through common evidence.

Plaintiffs contend that Prometheus misrepresented its future construction plans. But in order to recover on that claim, they will need to show that: (1) Prometheus made false representations; (2) they heard or read the misrepresentations; and (3) they reasonably relied on the misrepresentations to their detriment. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 811.) None of those elements can be demonstrated on a class-wide basis, particularly in light of Plaintiffs' admission (Answer to Petition at 10) that Mansion Grove tenants had widely varying levels of information regarding construction plans.

As the Court has repeatedly stated, "There is no doubt that reliance is the causal mechanism of fraud." (*In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 326.) Demonstrating reliance requires a plaintiff to show that, in the absence of the defendant's misrepresentation, "the plaintiff in all probability would not have engaged in the injury-producing conduct." (*Id.*) A misrepresentation cannot, of course, have caused a plaintiff to act in an injury-inducing manner if the plaintiff never heard or read the misrepresentation.

The principal piece of evidence to which Plaintiffs point in support of their misrepresentation claim is a lease addendum which Plaintiffs allege was attached to the lease agreement signed by every class member. The addendum stated, "[T]his property may be undergoing a major renovation." Plaintiffs allege that the addendum was misleading because: (1) the construction involved new units, and thus could not accurately be termed a "renovation"; and (2) Prometheus knew by at least June 17, 2007 that it planned to go forward with major construction. But unless Plaintiffs are far more conscientious than most tenants, many of them never read the addendum. Those who did not read it cannot claim to have been misled thereby and certainly cannot claim to have detrimentally relied on information contained in it.

The Court has held that reliance by absent class members can be inferred from circumstantial evidence under limited circumstances, even in the absence of direct testimony from those absent class members. (*See, e.g., Vasquez v. Superior Court*, 4 Cal. 3d at 814-15.) But the facts in this case do not remotely resemble *Vasquez*. In *Vasquez*, the plaintiffs alleged that it was the defendant's *unvarying* practice, when attempting to sell freezers and food to consumers, to orally convey to those customers the same fraudulent statements. (*Id.*) Thus, the plaintiffs alleged, every single class member (both the named plaintiffs and the absent class members) actually heard the defendant's misrepresentations. The Court held that that allegation was sufficient to withstand a demurrer because if at trial the plaintiffs could demonstrate the

existence of the alleged unvarying practice, then one could reasonably infer (pursuant to that practice) that absent class members actually heard and relied on the misrepresentation. (*Id.*) There is no similar evidence in this case. The complaint does not allege that every tenant had the addendum called to his attention at the time of lease signing. Accordingly, to the extent that Plaintiffs base their misrepresentation claims on the addendum, they will be required at trial to prove on a plaintiff-by-plaintiff basis that the addendum was actually read.[2]

*Amici* also note that the class includes every tenant who resided at Mansion Grove during the 2008-2010 construction period, even those who signed leases after construction had begun. Because the nature of the construction likely would have been apparent to all such Plaintiffs, it is difficult to discern how their reliance on alleged misrepresentations could be proven on a class-wide basis.

Even if Plaintiffs could demonstrate that each class member read the addendum, there is little case law support for their assertion that detrimental reliance on the addendum can be presumed. Accordingly, the need to prove reliance on a plaintiff-by-plaintiff basis ensures that individual questions of fact will overwhelm any common questions of fact with respect to the fraud and misrepresentation counts (Counts 4 and 5).

**The § 17200 Cause of Action**

The same rationale demonstrates that the predominance of individual questions of law requires decertification with respect to Plaintiffs' cause of action under Bus. & Prof. Code § 17200. That cause of action is based on claimed misrepresentations and concealment of information. Because individual class members received different amounts of information about construction plans, their claims cannot be tried on a class-wide basis.

A recent appeals court decision, *Davis-Miller v. Automobile Club of Southern California* (2011) 201 Cal. App. 4th 106, is instructive in this regard. It held that a suit alleging § 17200 violations could not be maintained as a class action because common questions of fact did not predominate over individual questions of fact. Although the plaintiffs alleged that the defendant

---

[2] Moreover, Plaintiffs concede that many tenants were provided much more detailed information regarding construction plans. Answer to Petition at 10. Thus, even if each such tenant read the addendum, whether he relied on it and was actually misled will require a detailed examination of his state of mind in light of all the information he received. Plaintiffs challenge the adequacy of the additional information (supplied via tenant meetings as well as flyers distributed in February and May 2008). Answer to Petition at 22-23. But whether the additional information was adequate is an issue of fact that will need to be tried separately with respect to each class member who received the additional information.

had falsely advertized the nature of its program for servicing car batteries, there was a serious question regarding whether all class members had actually seen the advertising. (*Id*. at 117.) Under those circumstances, the court held that the alleged misrepresentations could not be proven on a class-wide basis, explaining, "[W] do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was not exposed in any way to the allegedly wrongful business practice." *Id.* at 121. It concluded, "A class action cannot proceed for a fraudulent business practice under the UCL when it cannot be established that the defendant engaged in uniform conduct likely to mislead the entire class. . . . Specifically, when the class action is based on alleged misrepresentations, a class certification denial will be upheld when individual evidence will be require to determine whether the representations were actually made to each member of the class." (*Id.*)

In sum, the motion to decertify should be granted with respect to Count 7, given the need to determine whether individual tenants read the lease addendum on which Plaintiffs rely and the substantial evidence that many Mansion Grove tenants received significant information regarding construction plans from a variety of sources.

**Conclusion**

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court grant the Petition for Review. *Amici* request that the Court, at the very least, hold this petition and stay the trial until after it issues its decision in *Duran*, a case that raises virtually identical class action issues and in which the First District issued a decision that directly conflicts with the Superior Court's denial of the motion to decertify in this case.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
Chief Counsel

cc: See attached Proof of Service

**PROOF OF SERVICE**

I am employed in Washington, District of Columbia. I am over the age of 18 and not a party to the within action; my business address is 2009 Massachusetts Avenue, NW, Washington, DC 20036.

On July 14, 2012, I served true copies of the attached document, described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

Lee W. Clark
Lisa Lenoci
Dimalanta Clark, LLP
3600 W. Bayshore Road, Suite 101
Palo Alto, CA 94303

Marc A. Eisenhart
Nicholas G. Emanual
Gates, Eisenhart & Dawson
125 South Market Street, Suite 1200
San Jose, CA 95113-2288

Superior Court of California
Department 20
County of Santa Clara
191 N. First Street
San Jose, CA 95113

Clerk of Court
California Court of Appeal, Sixth District
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113

**BY MAIL**: I am "readily familiar" with the practices of the Washington Legal Foundation for collecting and processing correspondence for mailing with the U.S. Postal Service. Under that practice, it would be deposited with the U.S. Postal Service that same day in the ordinary course of business. I enclosed the foregoing in sealed envelopes as shown above, and such envelopes were placed for collection and mailing with postage thereon fully prepaid at Washington, DC on

that same day, following ordinary business practices.

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

Executed on July 14, 2012, at Washington, DC.

/s/ Richard A. Samp
Richard A. Samp