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October 3, 2006

Via Overnight Mail

Chief Justice Ronald M. George
Associate Justices Baxter, Chin,
Kennard, Werdeger, Moreno &
Corrigan
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: California Employment Lawyers Association
Request for Depublication (Cal. Rules of Court, rule 979(a))
Dunbar v. Albertson's, Inc.
A111153, Court of Appeal, First Appellate District, Division One

Honorable Justices:

This letter is submitted by California Employment Lawyers Association (CELA) under rule 979(a), California Rules of Court, requesting depublication of *Dunbar v. Albertsons, Inc.* (2006) 141 Cal.App.4th 1422, A111153, Court of Appeal, First Appellate District, Division One ["*Dunbar*"].

NATURE OF CELA'S INTEREST AND REASONS IT SEEKS DEPUBLICATION

CELA is a statewide organization of attorneys who represent primarily employees, but also employers, in wage and hour, employment termination, and discrimination cases. CELA is a frequent contributor of amicus curiae briefs in employment-related cases throughout California.

CELA seeks depublication of *Dunbar* for the following reasons: (1) *Dunbar* meets none of the standards for publication set forth in Rule 976(c); (2) *Dunbar* contradicts this Court's decision in *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 [*Sav-On*] by holding, or appearing to hold, that certification is precluded unless one class member's work duties can be extrapolated to all absent class members; (3) *Dunbar* contradicts *Sav-On* by requiring a heightened standard for class proponents to establish procedures for managing individual issues; and (4) Because orders granting certification are not appealable and intermediate appellate decisions regarding certification are primarily restricted to review of

certification denials under an extremely deferential standard of review, publication of cases such as *Dunbar* unfairly weights the body of authority toward certification denials, which will weaken the class action as an important vehicle for enforcement of California labor laws, as this Court recognized in *Sav-On*.

PROCEDURAL HISTORY

As in *Sav-On*, store managers in *Dunbar* sought certification of a class action to collectively recover unpaid overtime wages against an employer operating numerous stores in California.

As in *Sav-On*, plaintiff argued that whether the grocery managers' different tasks were exempt or nonexempt, issues common to the entire class, would predominate. As in *Sav-On*, defendant argued that individualized issues of liability and damages would predominate, primarily which tasks each manager worked, whether managerial tasks exceeded 50% of the work time, and variations in work performed from employee to employee. (*Dunbar*, 141 Cal.App.4th at 1425.)

As in *Sav-On*, the trial court considered competing evidence regarding standardized and uniform policies, declarations and counterdeclarations concerning the amount of time employees spent performing managerial and nonmanagerial tasks, and weighed the common issues against the individual issues. (*Id.* at 1425-1430.)

In contrast to *Sav-On*, however, the trial court denied certification. The trial court issued a detailed written decision, quoted verbatim in the Court of Appeal opinion[1]. The trial court stated it "is focusing on whether the work performed by any one GM is so similar to the work performed by any other GM that the Court can reasonably extrapolate findings from the named plaintiff to the absent class members." (*Id.* at 1430.) The trial court concluded that "Plaintiff has not demonstrated the commonality required for class certification. In particular, the Court has relied on deposition and declaration testimony indicating that the work performed by the GMs varied significantly from store to store." (*Id.*) Plaintiff appealed.

The Court of Appeal affirmed. The Court rejected Plaintiff's contention that the trial court findings were based on "improper criteria." The court held that the trial court's requirement that it be able to extrapolate the work of any one class member to the whole class was not an improper criterion. The court also held that Plaintiff did not sufficiently address manageability of individual issues because Plaintiff did not show at the certification stage how the various recognized types of innovative procedures for handling such issues would be used in particular by the trial court. (*Id.* at 1432-1433.)

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1 The Court of Appeal's inclusion of the trial court order is further basis for depublication because the court adopted questionable reasoning by the trial court that conflicts with *Sav-On*, as discussed below.

The Court's holding focused merely on the fact *the trial court had appropriately weighed the evidence to determine whether common issues predominated.* The Court concluded, "**The court performed its duty on the motion thoughtfully and thoroughly, and we have no cause to disturb its determination.**" (*Id.* at 1434, emphasis added.) Because *Sav-On* has guided Courts of Appeal not to re-weigh the trial court's evidentiary assessments, the Court of Appeal's opinion is nothing more than a cross-check on the trial court's application of procedural requirements. The language of its conclusion, "we have no cause to disturb its determination," is for more appropriate for an unpublished opinion.

The Court of Appeal initially ordered *Dunbar* not suitable for publication. Publications requests were submitted by numerous employer-based interests, including Cross Country Healthcare, the California Employment Law Council, class action defense firm Seyfarth Shaw, the National Retail Federation, Harman Management Corporation, Brinker International, Inc. (currently defending California class actions brought against it by both hourly and salaried employees), and Respondent Albertson's, Inc[2]. On August 10, 2006, the Court of Appeal issued an order granting publication.

REASONS THE COURT SHOULD DEPUBLISH *DUNBAR*

(1) *Dunbar* Meets None of the Standards for Publication Set Forth in Rule 976(c)

Rule 976(c) provides:

> No opinion of a Court of Appeal or a superior court appellate division may be certified for publication in the Official Reports unless the opinion: (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; (2) resolves or creates an apparent conflict in the law; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

2 The publication requests claimed that the decision constitutes one of "issue of continuing public interest" by providing guidance on the application of *Sav-On*, and involves different facts by virtue of the trial court having denied certification.

In light of the factual similarities to *Sav-On, Dunbar* does not apply existing rules to a different set of facts than those at issue in *Sav-On.*[3] Also *Dunbar* does not establish a new rule of law regarding class certification of exempt-non-exempt overtime cases, unless one were, improperly, to consider as "new law" *Dunbar's* holdings that are contrary to *Sav-On* and therefore *not* law. For the same reasons, *Dunbar* does not modify or criticize existing rules.

Nor does *Dunbar* resolve or create an apparent conflict in the law. There is no conflict in any of the law discussed by *Dunbar*, only statements of law in *Dunbar* that are contrary to the Supreme Court in *Sav-On.* With class action practice expanding in recent years, nearly any class case can be said to involve a legal issue of "continuing public interest," the primary element relied upon by those who requested publication; however, this does not justify publication of all class action cases, especially where the core of the decision is the Court of Appeal simply acknowledging that the trial court appropriately weighed the evidence to determine whether common issues predominated and had "no cause to disturb" the ruling.

Finally, *Dunbar* does not review the development of any common law rules or legislative or judicial history of the written law regarding class certification, hence it cannot qualify for publication for having made a significant contribution to the legal literature for doing so.

In summary, there is nothing in *Dunbar* that distinguishes it from other post-*Sav-On* certification decisions in California wage and hour class cases, none of which has been ordered published nor qualifies for publication[4].

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3 Though the *evidence* in *Dunbar* was different from that in *Sav-On* in terms of the degree of standardization and the purported variation in tasks performed, the factual posture of the two cases involving managers seeking certification for overtime claims based on misclassification is virtually identical. The publication proponents' reliance on the different factual procedural posture as following denial of certification does not constitute applying *Sav-On* to different *case facts* sufficient to warrant certification under Rule 979(c)(1).

4 *Dunbar's* criticism of plaintiff for purportedly relying on unpublished portions of *Conley v. Pacific Gas & Electric Co.* (2005) 131 Cal.App.4th 260, 264 provides further grounds for depublication. The court rejected plaintiff's argument that *Conley* supported reversal of the trial court, in itself a reasonable conclusion regardless of whether one agrees or disagrees. What warrants criticism is that the court appended the unsupported accusation that "he is evidently referring to the unpublished portion of that opinion, which cannot be considered. n1 (*Cal. Rules of Court, rule 977.*)" (*Dunbar*, 141 Cal.App.4th at 1432.) There is nothing in the record cited to indicate that plaintiff actually relied on this portion of the opinion and violated Rule 977. This type of loose analysis is unwarranted and lacks the impeccable reasoning generally associated with published opinions.

Accordingly, meeting none of the criteria for publication under Rule 976, *Dunbar* should be depublished under Rule 979.

(2) *Dunbar* Contradicts *Sav-on* by Requiring Extrapolation of the Tasks of One Class Member to the Remainder of the Class as a Condition for Certification.

The test for reversal of a certification decision by a trial court is whether the court relied on improper criteria or erroneous legal assumptions. Thus, *Dunbar* held that the trial court's legal reasoning was sound, that the trial court relied on correct law, when it denied class certification on the grounds that "findings as to one manager could not 'reasonably [be] extrapolate[d]' to others given the significant variation in the work performed by grocery managers." (*Dunbar*, 141 Cal.App.4th at 1431.)

However, this reasoning, by far the primary basis for the holding in *Dunbar*, repeated often in the opinion (e.g. at pp. 1429 and 1430), directly contradicts *Sav-On* and is inconsistent with class action jurisprudence in general. Class certification never requires that an issue must be capable of proof for the whole class based on evidence pertaining to any one class member, whether by "extrapolation" or otherwise. Neither the trial court nor the Court of Appeal cites any authority for such a novel proposition, and the proposition contradicts many principles confirmed in *Sav-On*. Rather, *Sav-On* held that a class can be certified in the absence of such extrapolation, because other evidence of common issues can justify certification. In *Sav-On*, the other evidence was either evidence of deliberate misclassification or evidence of de facto misclassification based in part on operational standardization.

It follows that there can be certification even if the evidence is that some employees might have been properly classified as exempt, but others were not. This is a long-standing principle of class certification, repeated a number of times in *Sav-On* (e.g., "'[A] class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her *eligibility for recovery* or as to the amount of his or her damages'"; "'[T]hat *each class member might be required ultimately to justify an individual claim* does not necessarily preclude maintenance of a class action.'"; Predominance is a comparative concept, and "'the necessity for class members to *individually establish eligibility* and damages does not mean individual fact questions predominate'"). (*Sav-On*, 17 Cal.4th at 333- 334, emph added, citations omitted.).

Dunbar would nullify this principle in one fell swoop, without any authority to do so.

Dunbar's statement justifying denial of certification on the grounds that findings of one manager cannot be extrapolated to the remainder of the class directly contradicts the result in *Sav-On*, where this Court rejected the exact same reasoning raised by the defendant. In fact, if that were the correct standard, no wage and hour misclassification case would ever properly be certified without a stipulation that each class member worked in the identical tasks and

percentages every day. If that were the law, *Sav-On* and every misclassification case certification order before or since would be in error. To the contrary, *Sav-On* establishes definitively that the individual issues raised to determine whether a group of employees works in excess of 50% of the time performing non-managerial tasks will not defeat certification in the face of other predominating common questions.

In *Sav-On*, "defendant argued that determining its liability, if any, for unpaid overtime compensation necessarily requires making individual computations of how much time each class member actually spent working on specific tasks." (*Sav-On*, 34 Cal.4th at 328.) This Court found the predominant issue in dispute was how the various tasks should be classified as either exempt or non-exempt. (*Id.* at 330.) This was because "[T]he fact is the tasks discussed in both defendant's and plaintiff's submissions comprise a reasonably definite and finite list." (*Id.* at 330-331.) The trial court in *Dunbar* rejected this reasoning in favor of its concern that the court extrapolate findings from the named plaintiff to absent class members. (*Dunbar* 141 Cal.App.4th at 1430.) This conclusion is contrary to *Sav-On*.

As in *Dunbar*, the defendant in *Sav-On* argued that "the actual tasks performed by class members and the amount of time spent on those tasks vary significantly from manager to manager and cannot be adjudicated on a class-wide basis" (*Sav-On*, 34 Cal.4th at 331) and "the central factual issues in this dispute [are] the actual tasks performed by class members and the amount of time spent on each of those tasks."

This Court was unpersuaded, finding that a reasonable court could conclude that the issues respecting the proper legal classification of the employees' actual activities, along with issues respecting defendant's policies and practices respecting operational standardization were likely to predominate in a class proceeding over any individualized calculations of actual overtime hours that might ultimately prove necessary. "But even if some individualized proof of such facts ultimately is required to parse class members' claims, that such will predominate in the action does not necessarily follow." (*Id.* at 334.)

Thus, *Dunbar's* reasoning conflicts with *Sav-On*.

Dunbar's ruling contradicts other language from *Sav-On* finding class certification appropriate where differences in job tasks preclude blanket extrapolation from one class member to remaining absent class members:

> Accordingly, neither variation in the mix of actual work activities undertaken during the class period by individual AM's and OM's, nor differences in the total unpaid overtime compensation owed each class member, bar class certification as a matter of law.

(*Id.* at 335.)

Such a rule placing high reliance for denying certification on variation in work tasks also contradicts established class action procedure that the community of interest requirement for certification does not mandate that class members' claims be uniform or identical. (*Id.* at 338; see also *Tierno v. Rite-Aid Corporation* 2006 WL 2535056 (N.D.Cal.) [certifying overtime class of retail managers and rejecting argument that assessing how each manager spent his or her time is required and variation in job duties barred certification] *Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2005) 231 F.R.D. 602, 614 [certifying overtime class and observing that "[c]ourts recognize that employer practices and policies with regard to wages and hours often have an impact on large numbers of workers in ways that are sufficiently similar to make class-based resolution appropriate and efficient.")

Most definitively, this Court in *Sav-On* declined to bar certification even where the defendant might demonstrate that some managers worked less than 50 percent of their time performing nonexempt tasks:

> Defendant suggests we bar class certification of an action based on such allegations, on the somewhat ironic (and only half-stated) surmise that some individual AM's and OM's may, in fact, have labored below the 50 percent mark on nonexempt tasks notwithstanding defendant's alleged class-wide policies and practices either designed or destined to assure the contrary. We decline the invitation.

(*Sav-On*, 34 Cal.4th at 337)

In other words *Sav-On* supports class certification even where all class members do not perform the same tasks, where the tasks of one cannot be extrapolated across the class, and where some employees may have qualified for the exemption. The inference from *Dunbar* that classes may not be certified in such circumstances thus contradicts *Sav-On* and supports depublication.

(3) *Dunbar* Contradicts *Sav-on* by Raising the Standard for the Level of Detail by Which a Plaintiff Must, at the Certification Stage, Specify the Trial Court's Use of Innovative Management of Individual Issues.

Sav-On recognized that individual issues often persist in class actions, even as to liability (eligibility for inclusion in the class), yet their presence does not bar certification:

> We long ago recognized "that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action." (*Collins v. Rocha, supra,* 7 Cal.3d at p. 238.) Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.'

(*Sav-On*, 34 Cal.4th at 334.)

To address individual issues, *Sav-On* suggested courts be "procedurally innovative," by considering "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." (*Id.* at 339.) *Sav-On* advocates the use of subclassing, survey results, damage formulae, and separate judicial or administrative miniproceedings to manage individual claims. (*Id.*)

Sav-On noted 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.*, emphasis added.) No procedural requirement beyond such a proposal is thus required.

Dunbar took issue with the plaintiff's assertion that the trial court failed to consider the use of innovative tools such as surveying and subclassing for managing individual issues, as established in *Sav-On*. It did so in the abstract, admittedly lacking a sufficient record to assess the proceedings in the trial court ["the record does not establish that the court failed to consider the use of exemplar plaintiffs, survey results, subclassing, or the other means plaintiff mentioned of managing individual issues. The court impliedly rejected those proposals...."]. (*Dunbar*, 141 Cal.App.4th at 1432.) In so doing, however, *Dunbar* imposed additional requirements beyond that contemplated by *Sav-On*:

> ***It is not sufficient, in any event, simply to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question, and plaintiff has failed to do so here.*** (See *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 545 [76 Cal. Rptr. 2d 567] [court not required to consider subclasses when not given "a concrete proposal describing how such subclasses would be defined, how they would be administered, or how they would help the court deal with the complexities inherent in the proposed class"]

(*Dunbar*, 141 Cal.App.4th at 1432-1433, emphasis added.)

Such a rigorous requirement conflicts with *Sav-On*, which specifically permits a party simply to propose applicable methodologies. *Sav-On* states, "***It is not our role at this stage either to devise or to dictate the methods by which a trial court conducting a particular class action may choose to manage it.***" (*Sav-On*, 34 Cal.4th at 339, n.12, emphasis added.) It also imposes additional procedural requirements on class action litigants beyond the California Rules of Court or judicial precedent. (See, e.g., *Tierno v. Rite-Aid Corporation, supra*, 2006 WL 2535056, *11[following *Sav-On* by not requiring plaintiff to affirmatively establish manageability procedures at the certification stage and stating that the trial court can fashion innovative procedural tools that can efficiently resolve individual questions regarding eligibility and damages, such as "administrative mini-proceedings, special master hearings, and specially fashioned formulas or surveys"]; *Romero v. Producers Dairy Foods, Inc.* (E.D.Cal.2006) 235 F

.R.D. 474, 487 [finding that under *Sav-On*, "courts may couple uniform findings on common issues with 'innovative procedural' tools that can efficiently resolve individual questions.")

A result of *Dunbar's* new requirements, an unintended consequence, likely will be to cause the trial courts and class action litigants additional work and expense at the certification stage. For example, it is likely there will be increased use of experts on the use of statistical or representative evidence at the certification stage, unnecessarily complicating certification proceedings.

(4) The Procedural Posture of *Dunbar* Supports Depublication.

Orders *granting* certification are reviewable only by writ[5]. Most writ applications result in summary denial with no published opinion.

By contrast, orders *denying* certification are directly appealable. Given that the standard of review on appeal is abuse of discretion, with great deference given the trial court's decision, creation of an entire body of law which examines the exercise of discretion in the limited context of certification denials without a corresponding published body of law addressing orders granting certification will result statistically in numerous decisions affirming certification denials in the virtual absence of decisions affirming orders granting certification. If appeals from denials are frequently published, it will inevitably result in many published appellate opinions affirming denial of certification, but few affirming the granting of certification because the granting is not appealable, and the hugely overwhelming majority of certified cases are settled and do not reach appeal. Evenness of case law is imperiled and will over time undermine the counterpoise which typically balances decisions reviewable under the abuse of discretion standard. Consequently, the Court should be wary of permitting publication of decisions reviewing denials of certification without a clear and compelling basis under Rule 976. Something more is required than merely asserting that the matter concerns an issue of continuing public interest. *Dunbar* does not meet that standard, resting as it does on simply reviewing whether the trial court properly weighed evidence and concluding it would not "disturb" its ruling.

Businesses loudly decry the burden of class action litigation and exposure. Yet the large number of companies settling wage and hour class actions for amounts hugely beyond the cost of defense constitutes credible evidence of pervasive non-compliance with labor laws. Just as employees are pleased to have the class action vehicle to collectively enforce their rights and impact working conditions at the policy level where individual actions might not do so, businesses are pleased to see a decision such as *Dunbar*, which they can advance to limit their exposure to class actions even as they remain out of compliance. *Dunbar* is already being pressed as the new class certification standard that somehow overrides *Sav-On*. Such a

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5 Orders granting certification are also reviewed on appeals from final judgment in favor of the class. Such appeals are quite rare, based on the very few extant reported decisions.

contention, however erroneous, is already creating obstacles to effective litigation and settlement in the very short time since the publication order.

With the Division of Labor Standards Enforcement understaffed and unable to monitor the huge California workforce, class actions are a necessary supplement to enforcement of California labor laws. As a result of class actions, more and more companies are self-correcting to come into compliance rather than face class action exposure. Witness the reclassification of assistant managers in *Sav-On* from salaried exempt to hourly overtime qualified. This is occurring in businesses throughout California, either to avoid class action exposure or after the defense of such a suit. This salutary result is threatened by the publication of cases like *Dunbar*, which skew the a body reported decisions in favor of denial of certification and contradict the important principles of class certification announced in *Sav-On*. The publication of a body of wage and hour law, simply applying the standards this Court set forth in *Sav-On*, that is restricted to reviewing certification denials under an abuse of discretion standard threatens to impede the great progress being made toward bringing employers into compliance with California labor laws.

Thank you for your consideration of this request.

Very truly yours,
COHELAN & KHOURY and
SPIRO, MOSS, BARNESS
HARRISON & BARGE LLP for
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Michael D. Singer

/MDS
cc: Service List on All Counsel
California Employment Lawyers Association
Court of Appeal, First Appellate District, Division One