COHELAN & KHOURY
A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

ATTORNEYS AT LAW

TIMOTHY D. COHELAN,* APLC
ISAM C. KHOURY, APC
DIANA M. KHOURY
MICHAEL D. SINGER•

(* Also admitted in the District of Columbia)
(• Also admitted in Colorado)

605 "C" STREET, SUITE 200
SAN DIEGO, CALIFORNIA 92101-5305
Telephone: (619) 595-3001
Facsimile: (619) 595-3000

www.cohelankhoury.com

KIMBERLY D. NEILSON
CHRISTOPHER A. OLSEN
PEGGY J. REALI
ALEXANDER I. DYCHTER*

December 6, 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
Amicus Curiae Letter in Support of Petition for Review
Alvarez v. May Dept. Stores Co. (S148276)
B184504 Court of Appeal, Second Appellate District, Division Four

Dear Honorable Justices:

This letter is submitted by California Employment Lawyers Association (CELA) as amicus curiae supporting the pending Petition for Review in the matter of *Alvarez v. May Department Stores Company* (S148276), Court of Appeal, Second Appellate District, Division Four (2006)143 Cal.App.4th 1223 [*Alvarez*].

NATURE OF CELA'S INTEREST AND REASONS IT SUPPORTS REVIEW

CELA is a statewide organization of attorneys who represent primarily employees in employment termination, discrimination, and wage and hour cases.

This case presents an issue never before addressed by this Court: **Under what circumstances does the denial of class certification preclude a subsequent effort to certify a "similar" class in a different case under principles of collateral estoppel?**

This issue effects virtually every California class action, spanning the full array from consumer and civil rights to labor and employment cases. *Alvarez* for the first time extends principles of collateral estoppel to create a "one chance" doctrine precluding subsequent certification efforts by putative class members with no notice of the initial action. Ignored

by *Alvarez* is the effect of different evidentiary record or the impact of improvident judicial rulings in other proceedings. Without any citation or analysis of the rule first stated in *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695 [*Daar*] that the denial of class certification is an appealable order *Alvarez'* misinterprets the nature of the appealability of certification denials as rendering a final decision forever barring putative class members with no participation or knowledge of the proceeding from litigating similar class claims in future proceedings. It creates a rule that is too broad and over-reaching, precluding subsequent certification proceedings by different parties on a different evidentiary record who were thus not "virtually represented" in previous actions to support claim or issue preclusion.

CELA supports the plaintiffs' Petition for Review of *Alvarez* for the following reasons:

1. **This Court Should Clarify *Alvarez* Whether the Appealability of Certification Denials Precludes Subsequent Class Actions; and**
2. **This Court Should Comprehensively Analyze Whether Collateral Estoppel by "Virtual Representation" Applies to Preclude Successive Class Actions in All Cases**

PROCEDURAL HISTORY

In a putative wage and hour class action for failure to pay overtime brought by retail store managers, the trial court sustained a demurrer to without leave to amend on the basis of collateral estoppel. Though not parties, the plaintiffs were putative class members in a previous case brought by the same attorneys (*Duran v. Robinsons-May, Inc.*) in which the trial court denied certification for the same claims.

The Court of Appeal affirmed. It made two rulings never addressed before by this Court or any other court of appeal. First, the court found that an individual has no protected due process "property right" to sue as class representative; the right to an individual hearing on the merits following a prior ruling denying certification is sufficient. Second, the court enunciated a far-reaching rule that parties in prior class suits with "sufficiently similar" interests may be deemed the "virtual representative" of the second party, precluding by collateral estoppel a second class proceeding by different parties on a different evidentiary record. The court observed that the same attorneys brought both cases and there was no allegation that the previous representation was "inadequate." Notice to the "absent class members" (sic[1]) was not required for purposed of collateral estoppel. (*Alvarez*, 143 Cal.App.3d at 1233-1239.)

---

[1] Because no class had been certified in *Duran*, there were no class members and hence no "absent class members," just class representatives and putative class members.

REASONS SUPPORTING REVIEW

1. This Court Should Clarify Whether the Appealability of Certification Denials Precludes Subsequent Class Actions

Prior to *Alvarez*, there was no rule in California precluding successive class actions. By contrast, Federal Rule of Civil Procedure [FRCP] Rule 23 freely permits parties to renew efforts to certify classes after certification is denied and does not preclude subsequent class actions following the denial of certification. (*Stephen v. Enterprise Rent-A-Car* (1991) 235 Cal.App.3d 806 [*Stephen*]; see, e.g., *Robbin v. Fluor Corp.* (9th Cir. 1987) 835 F.2d 213 [Second class action following the denial of certification on the merits is permitted but does not receive the benefit of the tolling of the statute of limitations under *American Pipe and Construction Co. v. Utah* (1974) 414 U.S. 538].)

There is one significant difference between Code of Civil Procedure section 382 class actions and FRCP Rule 23 class actions that has created the confusion leading to the decision in *Alvarez*: there is no direct appeal from a Rule 23 certification denial, while CCP 382 denials are directly appealable. *Daar* ruled that an order sustaining a demurrer to class allegations without leave to amend was appealable as "in effect a final judgment from which appeal lies." (*Daar v. Yellow Cab Co.*, *supra*, 67 Cal.2d 695, 699.) This Court explained its reasoning as follows:

> "'the question, as affecting the right of appeal, is not what the form of the order or judgment may be, but what is its legal effect.' . . . Although an order sustaining a demurrer with or without leave to amend is not the final judgment in the case . . . and is nonappealable . . . here . . . [i]n 'its legal effect' . . . the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff. . . . It has virtually demolished the action as a class action. **If the propriety of such disposition could not now be reviewed, it can never be reviewed.** This court has observed that it 'has long been the rule in this state that an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of **the particular action** and prevents further proceedings as effectually as would any formal judgment.' . . . We conclude that the order in the case at bench is in legal effect a final judgment from which an appeal lies . . . ."

(*Daar*, at 698-699, emphasis added, citations omitted.)

The court of appeal in *Stephen* extended the reasoning of *Daar*. It ruled that a party may not renew a certification motion after it has been denied, and that an order denying certification must be appealed within 60 days of entry and not from the final judgment. *Stephen* introduces the term "death knell" to certification denials, a term this Court has not

had occasion to adopt. "The appeal is allowed, as a matter of state law policy, because the order has 'the "death knell" effect of making further proceedings **in the action** impractical....'" (*Stephen v. Enterprise Rent-A-Car*, *supra*, 235 Cal.App.3d 806, 811, emphasis added.)

Alvarez does not cite *Daar* or *Stephen*, nor does it note that successive class cases are permitted under Rule 23. Inherent in its ruling, however, is the notion that the finality and appealability of a CCP 382 certification denial precludes a subsequent class suit that is "substantially similar." Otherwise, as California patterns class action procedure after Rule 23 in the absence of contrary state law, the *Alvarez* proceeding could not have been dismissed on the basis of the certification denial in *Duran*.

Yet the question persists: does the appealability of a certification denial (*Daar*), and the inability of a party to "renew" a certification motion following denial (*Stephen*), foreclose a subsequent class action as would be permitted under Rule 23? This Court should address that question.

Closely examining the language of *Daar*, it appears this Court was concerned that the propriety of an order dismissing class allegations in "the particular action" (not a subsequent case) could "never be reviewed." (*Daar*, *supra*, at 699.) *Daar*, therefore, does not in itself foreclose a certification proceeding in a subsequent case brought by a different party which would also be reviewable on appeal. Nor does *Stephen*, which also noted that further proceedings on the class issues *in that particular action* were terminated. (*Stephen*, *supra*, at 811.) Nor does Rule 23.

Addressing cases under the Fair Employment and Housing Act, one court of appeal opinion has held that Government Code section 12965, subdivision (b), precluded only concurrent, not successive class actions. (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 363-366 [rejecting claim that a class action filing in federal court by any member of the class bars any subsequent class claim in state court, and noting "any number of procedural errors in a federal court filing could prompt the dismissal of the federal action, long before class certification questions or the merits of the litigation are ever reached. If such a filing bars a subsequent class suit in state court, meritorious class claims could go unheard"].) The court indicated that if the substantive class *claims* had been adjudicated in federal court, principles of res judicata and collateral estoppel would prevent their relitigation in state court. (*Id.* at 363.)

The same reasoning applies where the first case is a state court case. Were there an across-the-board basis for precluding successive class actions on collateral estoppel grounds, the court would not have needed to make the statutory interpretation differentiating between precluded concurrent class actions from successive class actions.

Without further guidance from this Court, practitioners also face the question of how to proceed when courts deny certification "without prejudice." (See, e.g., *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 656 [motion denied without prejudice for failure to set out evidence in support; renewed motion permitted].) Following *Stephen*, the trial court's initial order denying certification was appealable and the failure to appeal and secure a reversal cut off the right to bring a renewed motion. Following *Alvarez*, any member of the putative class would be forever barred from bringing a class suit.

Some courts have expressed doubt as to whether such orders should continue to be appealable, particularly in view of the United States Supreme Court's rejection of the death knell doctrine in *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463 [57 L. Ed. 2d 351, 98 S. Ct. 2454]. (*Shelley v. City of Los Angeles* (1995) 36 Cal.App.4th 692, 695 n.4, citing *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758; *Rosack v. Volvo of America Corp.* (1982) 131 Cal.App.3d 741; *Petherbridge v. Prudential Sav. & Loan Assn.* (1978) 79 Cal.App.3d 509; *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122.)

In light of these concerns, it may be time for this Court to re-visit the ramifications of the appealability of certification denials.

Having never described certification denials as "death knell" orders, this court should re-examine the nature, scope, and effect of orders denying certification and clarify their impact on future proceedings.

It is thus time for this Court to clarify the effect of the appealability of certification denials on subsequent class actions by different parties by granting review of *Alvarez*.

2. This Court Should Comprehensively Analyze Whether Collateral Estoppel by "Virtual Representation" Applies to Preclude Successive Class Actions in All Cases

Alvarez based its application of collateral estoppel on the grounds that privity was established through "virtual representation." The effect of this rule is that virtually any putative class member is "virtually represented" in class actions in which he or she does not participate and has no knowledge and may never serve as either a class representative or absent class member in a subsequent action on a different record. In other words, before being designated as "class counsel" for a certified class, attorneys bringing a putative class action are the "virtual representative" of hundreds, thousands, or perhaps millions of unknown claimants who do not know they are being represented, binding them all from forever bringing a class action in the event the court denies certification without being given

notice[2]. *Alvarez* reasoned that this is only fair because these individuals would be bound if the class were certified, but this ignores the fact that a procedural right is being foreclosed that would not be in the event of certification. It also fails to account for the history of due process concerns incorporated into the notice and opt-out process under CCP382 and Rule 23 classes. This new rule reaches into virtually every future class action in California. In keeping with California public policy favoring class actions, this Court should grant review to comprehensively address all parameters of such a broad rule affecting the rights of so many potential class action claimants.

Alvarez recognized that "In the final analysis, the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." (*Alvarez*, 143 Cal.App.4th 1223, 1237.) It then found preclusion of subsequent class cases fair, its result applicable to virtually any class case:

> In analyzing the facts, we conclude the *Duran* plaintiffs were the "virtual representatives" of appellants. The only difference we can discern between the parties is the name of the representative plaintiff. The interested parties, their claims, and their counsel are the same. We also examine whether the first party had the same interest as the precluded party and the motive to present the same claim. (*Clemmer, supra*, 22 Cal.3d at p. 877.) The *Duran* plaintiffs had a strong motive to assert the same interest as appellants, as each group's goal was identical--each wanted its class certified. As noted, the *Duran* plaintiffs had a full opportunity to present their case. The circumstances are such that appellants should reasonably have expected to be bound by the *Duran* decision. As appellants would have enjoyed the fruits of a favorable outcome, fairness dictates that they should be bound by the effect of the decision against them. Ultimately, applying the doctrine of collateral estoppel does not lead to an unfair result, as appellants remain free to litigate the merits of their personal claims.

(*Alvarez*, at 1238.)

Paraphrasing, where parties to a first class case have a "full opportunity" to present their claim but are denied certification, a party asserting the same interests may not attempt to establish a class in a second case on a different evidentiary record. In other words, *Alvarez*

---

[2] This also raises the question whether courts must now order notice of denial of certification (contradicting the rule recently against such notice set forth in *Experian Information Solutions, Inc. v. Superior Court* (2006) 138 Cal.App.4th 122) in order to ensure resources are not wasted on subsequent class cases that must be dismissed or to notify potential litigants of the need to challenge representation in a prior case.

has created the "one chance doctrine," binding putative absent class members who have not agreed to be bound through an opt-out process to a certification proceeding in which they had no notice and could not participate. The due process considerations raised demand review.

This holding apparently applies regardless of the quality of presentation in the initial action, though there is some language indicating that a challenge could be made on the basis of "inadequate representation." (*Alvarez*, at 1236-37.) According to *Alvarez*, the subsequent party "should reasonably have expected to be bound" by the prior action and whatever record was presented. (*Id.*, at 1238.) The unintended consequence is the tacit encouragement for parties to engage in the unseemly effort of attacking prior class counsel or otherwise finding fault or error in the previous motion, rather than basing a subsequent case on the objective criteria of new or different parties and evidence.

Alvarez also raises the question of whether a certification denial effectuated for the first time on demurrer bars subsequent cases for any putative class member. Such rulings with utterly no evidentiary record are possible if courts find no reasonable possibility *in that case* of pleading a prima facie community of interest among class members. (See *Alvarez*, 143 Cal.App.4th at 1231 ["It may be proper at the pleading stage to strike class allegations if the face of the complaint and other matters subject to judicial notice reveal the invalidity of the class allegations"].)

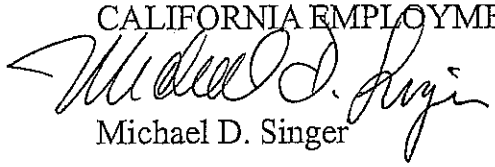
Other unanswered questions raised include the effect of a decertification ruling following certification on grounds peculiar to a particular factual or evidentiary matter and whether violations occurring during the time frame subsequent to the initial certification denial are also barred from subsequent class adjudication under the "one chance" doctrine. There is also the matter of whether a defendant might somehow preemptively implement a certification denial on a poor record in order to forever protect itself from class-wide responsibility.

Alvarez' conclusions and consequences, and the principles they purport to apply to all future class actions, demand review. With class actions having evolved to such a significant tool in the collective enforcement of legal rights for consumers, employees, and others, a ruling cutting off the use of this tool must be carefully examined and requires the strict scrutiny of this court.

///
///
///

Thank you for your consideration of this request.

Very truly yours,
COHELAN & KHOURY for
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION



Michael D. Singer

/MDS

cc: Service List on All Counsel
California Employment Lawyers Association
Court of Appeal, Second Appellate District, Division Four

SERVICE LIST

Court of Appeals of California (1 copy)
California Court of Appeal
Second Appellate District, Division 4
Ronald Reagan State Building
300 So. Spring St. 2nd Floor
Los Angeles, CA 90013

Counsel for Defendant May Department Stores Company (1 copy)
John Curtis, Esq.
Law Offices of Julia Azrael
5200 Lankershim Blvd., #850
North Hollywood, CA 91601

David E. Martin, Esq.
The May Department Stores Co.
611 Olive Street
St. Louis, Missouri 63101

Counsel for Plaintiff (1 copy)
Howard Scott Leviant, Esq.
ARIAS, OZZELLO & GIGNAC LLP
6701 Center Drive West, Suite 1400
Los Angeles, CA 90045

Jeffrey Spencer, Esq.
Law Office of Jeffrey P. Spencer
635 Camino De Los Mares, Suite 312
San Clemente, CA 92673

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan & Khoury, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On December 6, 2006, I served the foregoing documents described as **California Employment Lawyers Association Amicus Curiae Letter in Support of Petition for Review** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[XX] **BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[ ] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed December 6, 2006 at San Diego, California.

Amber Worden

Amber Worden