No. S233983

IN THE SUPREME COURT OF CALIFORNIA

MIKE HERNANDEZ, *et al.*,

Plaintiffs and Respondents,

FRANCESCA MULLER,

Plaintiff and Appellant;

v.

RESTORATION HARDWARE, INC.,

Defendant and Respondent.

After a Decision of the Court of Appeal, Fourth Appellate District, Div. 1, No. D067091;
San Diego Superior Court, Central Div., No. 37-2008-00094395-CU-BT-CTL
Hon.William S. Dato, Judge

REPLY TO ANSWER TO PETITION FOR REVIEW

LAWRENCE W. SCHONBRUN (CSB No. 054519)
LAW OFFICE OF LAWRENCE W. SCHONBRUN
86 Eucalyptus Road
Berkeley, CA 94705
Telephone: (510) 547-8070

Attorney for Plaintiff Class Member-Appellant and Petitioner Francesca Muller

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Telephone: (510) 547-8070

Attorney for Plaintiff Class Member-Appellant and Petitioner Francesca Muller

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INTRODUCTION

Petitioning Class Member asks this Court to resolve a dispute that now exists among California courts of appeal about how an unnamed class member in a class action can obtain appellate standing:

> "Is this Court's 1942 *Eggert* decision controlling authority for the rule that, in California, an unnamed class member in a class action can only obtain appellate standing by intervening? Or should this Court adopt the position of the otherwise nearly unanimous[1] California courts of appeal ... which have recognized appellate standing for unnamed class members who do not seek to intervene but who file an objection and appear at a fairness hearing."

(Appellant's Petition for Review ("Appellant's PR") at 3, and at 3-4.

This case, like *Eggert v. Pacific States Savings and Loan Company, et al.*, 20 Cal.2d 199 (Apr. 21, 1942), involves the issue of a fee request that was filed after a judicial determination of the class's claims. The fact that the class's relief was resolved by a trial court ruling is irrelevant, even if unusual. In *Eggert*, unlike *Restoration Hardware*,[2] it is notable that class members were given an opportunity to object at a hearing on the attorneys' fee motion. Indeed, that is the true "anomaly"[3] of the *Restoration Hardware* case – that class members were provided no notice.

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[1] *But see Sherman v. Allstate Ins. Co.*, 90 Cal.App.4th 121 [108 Cal.Rptr.2d 722] (2d App. Dist., Div. 7, June 25, 2001), ... denying standing to a class member who did not intervene.

[2] *Hernandez, et al.; Francesca Muller, Pl. and Appellant v. Restoration Hardware, Inc.*, 245 Cal.App.4th 651 [199 Cal.Rptr.3d 719; 2016 Cal.App. LEXIS 185] (4th App. Dist., Div. 1, Mar. 14, 2016).

[3] Resp'ts Answer to Petition for Review ("Resp'ts APR") at 1.

CLASS COUNSEL'S MISSTATEMENT OF FACTS AND PROCEDURE

Class Counsel misstate the chronological order of events in their Statement of the Case (Resp'ts APR 2-4). They present the following as a factual statement of the procedural history of this case:

> [Class Counsel] filed a motion for attorneys' fees in the amount of $9,103,087.50, or 25% of the $36,412,350 judgment amount. Defendant agreed not to oppose the request if it was limited to 25% of the judgment following trial (as opposed to 33%).

(Resp'ts APR 3.)

This implied sequence hides the fact that a settlement preceded the filing of Class Counsel's fee motion. By their own admission, a settlement of the fee issue was negotiated before they filed their motion for attorneys' fees. In their declaration, Class Counsel state:

> After meeting and conferring at arms-length with Restoration Hardware to avoid further litigation on this issue, Class Counsel agreed to request only 25% of the common fund and Restoration Hardware agreed not to oppose this request.

> (Resp'ts Appendix to Opposition Brief at 122:12-14 [Decl. James R. Patterson in Support of Mot. for an Award of Attorneys' Fees, etc., filed 7/18/14, at 2:12-14] (emphasis added).)

It was only after that Class Counsel negotiated an agreement regarding attorneys' fees that Class Counsel filed their fee motion. Class Member Muller believes that this factual misstatement of the record is consistent with Class Counsel's strategy at the appellate court as well; namely, a refusal to acknowledge that there was a settlement negotiated between the parties on the attorneys' fee issue.

LEGAL DISCUSSION

I.

THE SUBSTANTIVE ARGUMENTS RAISED BY CLASS COUNSEL ARE IRRELEVANT BECAUSE THE ISSUE IS JURISDICTIONAL

Because Class Member Muller's appeal was dismissed, the appellate court never reached any of the substantive issues raised by her. The merits of the arguments raised by Class Counsel in their Respondent's Opposition Brief on the appellate level are therefore irrelevant to Class Member Muller's Petition for Review. Her Petition raises a jurisdictional issue.

1. It is irrelevant that the trial court's award of reasonable attorneys' fees occurred after a bench trial on Defendant's liability for the class's claims rather than by a settlement of the class's claims. (Resp'ts APR 1.) The fact that this petition occurs in the particular context of a bench trial of the class's claims has no relevance to whether this Court's 1942 decision in *Eggert, supra,* requiring party-of-record status to appeal, is still good law. The fact that the class's damages were fixed by the court at a bench trial is irrelevant to the jurisdictional issue of how an unnamed class member obtains appellate standing to challenge a trial court award of reasonable attorneys' fees in a class action.

Nowhere in *Eggert* is there any suggestion that the fact that the class's claim was resolved on the merits by the court prior to the fee award had any bearing on this Court's ruling that class members who were not "parties to the record" lacked appellate standing. (Resp'ts APR 6.) This is a distinction that is totally irrelevant, both to this Court's holding in *Eggert* and to the issue for which review is sought by Class Member Muller.

2. It is irrelevant that 0.7 percent of civil disputes are resolved through a trial verdict (according to the *California Class Action Litigation*, 2000-2006 First Interim Report (Judicial Council of California, Admin. Ofc. of the Courts, March 2009) [Resp'ts APR 1, 5]. That there was a trial verdict on the amount of the

class's claims is irrelevant to whether an unnamed class member in a class action needs to intervene to obtain appellate standing.

3. It is irrelevant that Class Counsel believe that the trial court was correct in characterizing the fee awarded to them as "eminently reasonable." (Resp'ts APR 1, 4.)

4. The underlying merits of Class Member Muller's claims of error in the court of appeal as well as Class Counsel's counterarguments are all irrelevant to Class Member Muller's Petition for Review:

(a) that Class Counsel believe that no notice was required to be sent to class members (Resp'ts APR 7);

(b) that Class Counsel believe that Class Member Muller, along with other class members, has no property interest in the class's settlement fund (Respt's APR 9);

(c) that Class Counsel believe that Class Member Muller is not an aggrieved party (Resp'ts APR 7);

(d) that class action settlements are subject to "specific procedures" contained in the California Rules of Court (Resp'ts APR 1).

The court of appeal never reached <u>any</u> of these issues. Indeed, Class Member Muller's Petition for Review concerns under what circumstances an unnamed class member has standing to have a court of appeal rule on those issues.

5. Furthermore, the fact that any reduction in the fee award would not increase a class member's recovery (Resp'ts APR 9) is again irrelevant to the issue in Petitioner Muller's Petition for Review and is furthermore untrue. (See page 11, *infra*, Court's statement at Reporter's Appeal Transcript, 9/5/14, Vol. 1 (hereinafter "Rep. Appeal Tr. 9/5/14") at 17:10-15.)

6. The *Restoration Hardware* court never reached the issue of whether Class Member Muller was aggrieved. Aggrievedness is a separate, new issue, and it is not an issue before this Court. It is entirely irrelevant to whether or not

Petitioner Muller's failure to move to intervene and vacate the judgment caused her lack of appellate standing.

II.

CLASS COUNSEL RAISE MANY POINTS THAT ARE OUTRIGHT UNTRUE, MISLEADING OR WITHOUT CITATION TO THE RECORD OR LEGAL AUTHORITY

1. There is no "new rule" at issue in this case. The issue presented, in fact, is about an old rule: Is this Court's 1942 *Eggert, supra*, decision still good law? If *Eggert* is, as Class Counsel characterize it, "longstanding precedent" (Resp'ts APR 1), should it be overruled?

Class Counsel argue that the civil class action trial is "an endangered species" (Resp'ts APR 1), making it unsuitable "to serve as new precedent" (*id*). One could argue, on the contrary, that *Restoration Hardware* is the perfect case to test the continued viability of *Eggert* because in the instant case the trial court, like *Eggert*, resolved the class's claims, after which a motion for attorneys' fees was objected to and subsequently appealed by unnamed class members.

2. It is misleading to state that "The issue below was the appropriateness of attorney fees awarded...." (Resp'ts APR at 1; emphasis added.) Rather, the two issues at the trial level and the appellate level are:

(a) In this class action common fund settlement, were unnamed class members, including Class Member Muller, entitled to formal notice of Class Counsel's fee request of 25% of the class's recovery and a description of the procedures to allow a class member to formally object to that fee request?

(b) Was it permissible for this Court to award 25% of the class's recovery as a reasonable attorneys' fee using the percentage method as the starting point of the fee calculation in light of *Serrano v. Priest (Serrano III)*, 20 Cal.3d 25, [141 Cal.Rptr. 315] (Oct. 4, 1977)?

This latter issue is particularly notable in light of this Court's acceptance for review of *Laffitte v. Robert Half Int'l, Inc., et al.; David Brennan, Plaintiff and Appellant,* Cal. Supreme Court No. S222996 (231 Cal.App.4th 860 [180 Cal.Rptr.3d 136; 2014 Cal.App. LEXIS 1059] (2d App. Dist., Div. 7, Oct. 29, 2014)).

3. It is both untrue and asserted without citation to any authority that there is a so-called "California[] 33-1/3% benchmark." (Resp'ts APR 1.) It is surprising that Class Counsel would make such a claim to this Court, since it has accepted for review the question: "Does this Court's seminal decision in *Serrano v. Priest (Serrano III)*, 20 Cal.3d 25 [141 Cal.Rptr. 315] (Oct. 4, 1977), permit a trial court to anchor its calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered?"[4]

4. Class Counsel assert, without citation to the record, that Class Member Muller "conceded that she had no authority to support her request that the trial court order a second notice to the class regarding the fee motion." (Resp'ts APR 4.) Nothing could be further from the truth. In fact, Class Member Muller cited two authorities to the trial court at the hearing:

(a) California Rules of Court (CRC), Rule 3.769, regarding the fact that the fee settlement had to be noticed to the class (see Rep. Appeal Tr. 9/5/14 at pp. 10-13), since Class Counsel's fee request was based on a negotiated settlement of the attorneys' fee portion of the litigation between Defendant and Class Counsel.

(b) Federal Rules of Civil Procedure, Rule 23, clearly requires notice to class members of a fee request by Class Counsel. When a motion for attorneys' fees is filed by class counsel, class members have a right to notice of the motion and the right to object. (Rep. Appeal Tr. 9/5/14 at pp. 10-13.)

---

[4] See California Supreme Court website, www.courts.ca.gov/supremecourt.htm, Case No. S222996, "Case Summary."

> Mr. Schonbrun: [T]he federal statutes are much clearer and talk about the fact that when counsel makes a motion for attorneys' fees class members have a right to review that motion and object.

(Rep. Appeal Tr. 9/5/14 at 7:9-12.)

5. It is either untrue or questionable whether *Eggert* is "good law." (Resp'ts APR at 6.) The numerous courts of appeal decisions listed in Class Member Muller's Petition for Review (at pp. 3-4) have ignored *Eggert's* holding that an unnamed class member must formally intervene and move to vacate the judgment.

6. It is untrue that "Class Counsel supplemented the [fee] motion with a traditional lodestar calculation." (Resp'ts APR 3.) Class Member Muller explicitly argued at the trial court that this calculation was not a traditional lodestar:

> Mr. Schonbrun: [T]he lodestar approach is the reasonable number of hours that have been worked on the case, ... multiplied by the prevailing market rate for the service rendered ... class counsel has not submitted sufficient information on the hours, for one, to determine whether or not these hours were indeed reasonably spent.
>
> The Court: Well, on that latter point, Mr. Schonbrun, the reference to lodestar in the tentative certainly was intended, and I think reasonably is understood, to be counsel's submitted lodestar. In other words, counsel takes the position that they have worked X number of hours at certain hourly rates to yield an aggregate lodestar of, in this case, approximately 2.5 million.

(Rep. Appeal Tr. 9/5/14 at 23:11-25 (emphasis added).)

7. It is untrue that Petitioner Muller "admitted she could only 'guess' as to whether Class Counsel submitted sufficient information for a lodestar analysis...." (Resp'ts APR 4.) No citation to the record is provided for this assertion. As demonstrated by the colloquy immediately above, the fee petition could not have been properly reviewed as regards a lodestar analysis because necessary information was absent. (See pages 9 and 10, *infra*.)

III.

CLASS COUNSELS' MAJOR ARGUMENTS ARE BOTH IRRELEVANT AND INCORRECT

A. Class Member Muller Challenged the Amount of the Fee Award, but Even If She Had Not, Her Challenge to the Method by Which the Fee Was Calculated Was Sufficient.

Even if it were true that Class Member Muller did not challenge the amount of the fee request, it is irrelevant. She was aggrieved when the trial court awarded a fee based on the percentage method as a starting point, which was prohibited by this Court in *Serrano III, supra*. When a trial court disregards *Serrano III* and determines its fee award using the percentage method as a starting point, each class member is aggrieved.

> Our state Supreme Court has accepted review in a case that will likely shed light on the issue, as it concerns whether a trial court may anchor its calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered. (See *Laffitte v. Robert Half Internat., Inc.*, review granted Feb. 25, 2015, *S222996*.)

Roos v. Honeywell International, Inc., 241 Cal.App.4th 1472, 1492 n.8 [194 Cal.Rptr.3d 735] (1st App. Dist., Div. 1, Nov. 10, 2015).

Class Member Muller's argument as to an award of excessive fees was not waived.

> Mr. Schonbrun: I believe you made the statement in your opinion[5] that the lodestar is the amount of time the lawyers worked on the case at their hourly rate, which I think is a misstatement of the law.

(Rep. Appeal Tr. 9/5/14 at 23:4-8.)

> The Court: I certainly understand that if one were to award a fee based on the lodestar multiplier approach, that the counsel's lodestar would be subject to an evaluation as to whether those hours were reasonable. No dispute about that. And in this case, you're correct that we never got to that analysis because the fee is being awarded based on a percentage manner (sic) [method].

(Rep. Appeal Tr. 9/5/14, at 23:26-28 - 24:1-4; emphasis added.)

Class Member Muller argued that the use of the lodestar as a mere cross-check rather than as a starting point was improper, and that class members were harmed by the trial court's violation of law. Class Member Muller argued:

> Mr. Schonbrun: Number two, I don't believe it's true that the – I think you said in this case or generally that the percentage method more closely aligns the interest of class members than the lodestar method. I think that's absolutely untrue. The percentage method historically has been known to overpay lawyers. And that's, in fact, why the lodestar method was adopted, because these percentages were overpaying the lawyers for the work they did.
>
> So it's not – I don't believe it's accurate to say that it aligns the interests of the class members with the lawyers. It aligns the interest of the lawyers with getting a larger fee. And I must say I also disagree with your statement, if my secretary read this correctly to me, I believe you made the statement in your opinion that the lodestar is the amount of time the lawyers worked on the case at

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[5] Appellant's Appendix at 11, Second Amended Minute Order, filed 9/5/14.

> their hourly rate, which I think is a misstatement of the law.

(Rep. Appeal Tr. 9/5/14 at 22:20-28 – 23:1-8; emphasis added.)

On or about August 29, 2014, Class Counsel filed "Supplemental Briefing in Support of Motion for Award of Attorney Fees, Award of Litigation Costs to Class Counsel, and Incentive Awards to Class Representatives" along with supporting declarations (see Resp'ts Appendix to Opposition Brief, pp. 133-171) providing the trial court with the following information:

Combined hours claimed:		3,550.5 hrs.
Combined average hourly rate claimed:		$708.17
Self-Proclaimed Lodestar:		$2,514,357.58
Partner Hours:		
Patterson Law Firm's Total Hours:		2,263.8 hrs.
Partner Hours, 88%:	1,985.1	
(Nonpartner Hours, 12%:	278.7)	
Stonebarger Law Firm's Total Hours:		1,286.7 hrs.
Partner Hours, 94%:	1,204.0	
(Nonpartner Hours, 6%:	82.7)	

The percentage of total hours made up by partner hours supports a strong argument that the fees claimed were excessive.

B. It Is Both Irrelevant and Untrue that Class Member Muller's "Objection to the Attorneys' Fee Award Is Purely Theoretical." (Resp'ts APR at 9.)

It is not a theoretical issue as to whether this Court requires a superior court to base its calculation of reasonable attorneys' fees primarily on the legal services provided. On the contrary, while a purely legal question, it is a significant enough issue that this Court granted review to *Lafitte v. Robert Half International, Inc.* (see pages 6 and 8, *supra*). Over a period of decades, billions of dollars in

attorneys' fees are generated in class action settlements. Fee awards are highly tangible and vigorously fought over. Nonetheless, whether or not Class Member Muller's objection to the fee calculation methodology is theoretical is irrelevant to the issue of appellate standing presented by her Petition for Review.

C. The Issue of Whether the Class (or Class Member Muller) Lacked a Property Interest in the Settlement Is Both Irrelevant and Untrue.

Class Counsel state no legal authority for the proposition that where a fee request is reduced by the court and the excess does not go to the class (but rather reverts to the defendant), class members have no property interest that requires that they receive notice. It is because it was a common fund recovery,[6] and the fee was paid out of the class's recovery, that class members *ipso facto* have a property interest in their recovery. A class action settlement that provides that any fee reduced by the court goes to the defendant rather than to the class's fund does not negate the class's property interest in their fund recovery at the outset.

D. Class Counsel's Assertions about Conflict of Interest Are Both Irrelevant and Untrue.

Class Counsel attempt to distinguish the instant case on the basis of a potential conflict of interest between Class Counsel and the class. (Resp'ts APR 5.) This is both irrelevant and untrue because if every class member filed a claim, the class's overall recovery would have been affected by the size of fee award.

> The Court: I understand your position here is that <u>in all likelihood</u> -- and I agree with you – <u>in all likelihood, although we don't know what the final tally is going to be</u>, no class

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[6] "Attorneys fees ... and cash payments to Class members will be paid <u>from this common fund</u>." (Resp'ts Appendix to Opposition Brief at 94:14-15 [Mem. P&A in Support of Mot. for Award of Attorney Fees, etc. at 2:14-15] (emphasis added).)

> member is going to have their recovery reduced as a result of the attorneys' fees that you have requested here.

(Rep. Appeal Tr. 9/5/14 at 17:10-15; emphasis added.)

Petitioner Muller agrees that it was, as in most class actions, unlikely (but not impossible) that the full amount of the settlement would be claimed by class members and therefore unlikely that each class member's recovery would be reduced by the attorneys' fee award.

Moreover, contrary to class Counsel's assertion, this case does present an actual concrete financial conflict of interest as Class Counsel are seeking an award from their clients' recovery.

IV.

DEPUBLICATION WOULD NOT RESOLVE THE LEGAL QUESTION POSED BY THIS PETITION

Class Counsel aver in the Answer to Petition for Review that "the most it [this Court] should do is depublish *Hernandez v. Restoration Hardware, Inc.....*" (Resp'ts APR at 1; citations omitted).) In fact, depublishing *Restoration Hardware* would have no effect on *Eggert, supra*, nor would it alter the existing conflict among California courts of appeal regarding appellate standing. Another published opinion, also relying on *Eggert*, still exists that requires intervention for an unnamed class member to obtain appellate standing: *Sherman v. Allstate Ins. Co.*

> *Eggert* found that unnamed class members whose only appearance was to object to the attorneys' fees had no standing to appeal on the ground they were not parties and had "ample opportunity ... to become parties of record...." (*Eggert v. Pac. States S. & L. Co., supra,*, 20 Cal.2d at p. 201.)
> ....
> We find, however, that mere participation in the proceedings is insufficient to confer appellate standing.

Sherman, supra, 90 Cal.App.4th at 127.

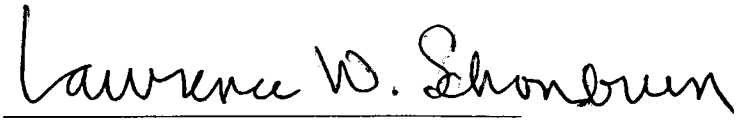
Depublication would merely satisfy the self-serving financial interests of Class Counsel in avoiding a court ruling on the underlying merits of Class Member Muller's appeal.

CONCLUSION

For the reasons cited herein and in her Petition for Review, Class Member Muller respectfully requests this Court to grant review.

Dated: May 20, 2016.

Respectfully submitted,

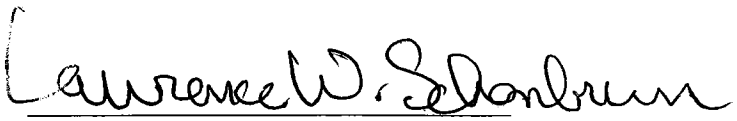


Lawrence W. Schonbrun
Attorney for Plaintiff Class Member-Appellant
and Petitioner Francesca Muller

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the attached Reply to Answer to Petition for Review contains 3,496 words of proportionally spaced Times New Roman 13-point type as recorded by the word count of the Microsoft Office 2007 word processing system, and is in compliance with the type-volume limitations permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: May 20, 2016



Lawrence W. Schonbrun

CERTIFICATE OF SERVICE

I declare that:

I am over the age of 18 years and not party to the within action. I am employed in the law firm of Lawrence W. Schonbrun, whose business address is 86 Eucalyptus Road, Berkeley, California 94705, County of Alameda.

On May 20, 2016, I caused to be served a copy of the following document:

REPLY TO ANSWER TO PETITION FOR REVIEW

__x__ by mail on the below-named parties in said action, in accordance with CCP § 1013, by placing true and accurate copies thereof in a sealed envelope, with postage thereon fully prepaid, and depositing the same in the United States Mail in Alameda County, California, to the addresses set forth below:

James R. Patterson, Esq.
Allison Goddard, Esq.
Patterson Law Group APC
402 W. Broadway, 29th Fl.
San Diego, CA 92101
Tel: (619) 756-6990
Fax: (619) 756-6991
jim@pattersonlawgroup.com
Attorneys for Plaintiff Class

Gene J. Stonebarger, Esq.
Stonebarger Law
75 Iron Point Circle, Ste. 145
Folsom, CA 95630
Tel: (916) 235-7140
Fax: (916) 235-7141
gstonebarger@stonebargerlaw.com
Attorneys for Plaintiff Class

David F. McDowell Jr., Esq.
Purvi G. Patel, Esq.
Morrison & Foerster LLP
707 Wilshire Blvd., Ste. 6000
Los Angeles, CA 90017
Tel: (213) 892-5200
Fax: (213) 892-5454
dmcdowell@mofo.com
PPatel@mofo.com
Attorneys for Defendant Restoration Hardware, Inc.

Clerk, San Diego Superior Court
Central Div., County Courthouse
220 W. Broadway, 3rd Fl.
San Diego, CA 92101

Clerk, Court of Appeal
Fourth Appellate District
750 B Street, Ste. 300
San Diego, CA 92101

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

Executed on May 20, 2016, at Berkeley, California.

Sandra Norris

Sandra Norris