No. S233983

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MIKE HERNANDEZ, *et al.*,

Plaintiffs and Respondents,

v.

FRANCESCA MULLER,

Plaintiff and Appellant;

RESTORATION HARDWARE, INC.,

Respondent.

SUPREME COURT
FILED

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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

APPELLANT FRANCESCA MULLER'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

> This case presents the following issue: Must an unnamed class member intervene in the litigation in order to have standing to appeal? (See *Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199.)

California Supreme Court, www.courts.ca.gov/supremecourt.htm, Case Search Information, No. S233983, Case Summary.

The decision in *Hernandez, et al., Pls. and Resp'ts; Francesca Muller, Pl. and Appellant v. Restoration Hardware, Inc., Def. and Resp't*, 245 Cal.App.4th 651 [199 Cal.Rptr.3d 719], 2016 Cal.App. LEXIS 185 (4th App. Dist., Div. 1, Mar. 14, 2016) (hereinafter *Restoration Hardware*), held that this Court's 74-year-old decision in *Eggert v. Pacific States Savings and Loan Company, et al.*, 20 Cal.2d 199 (Apr. 21, 1942), requires an unnamed class member in a class action to intervene[1] in the litigation in order to obtain appellate standing.

> "[I]t is a settled rule of practice in this state that only a party to the record can appeal...."

Restoration Hardware, 245 Cal.App.4th at 659, *citing Eggert*, 20 Cal.2d at 201.

> [Class Member Muller] did not move to intervene in the action....
>
> ....
>
> The appeal is dismissed.

Id. at 245 Cal.App.4th at 654 and 663, respectively.

If the *Restoration Hardware* court's analysis is correct, should this Court's *Eggert* decision continue to be the law of this state?

---

[1] The terms "intervene" and "intervention" do not in fact appear in the text of the *Eggert* decision. The precise language of *Eggert* is "be made parties ... into the action." (*Eggert*, 20 Cal.2d at 201.)

> Appellants were not named as parties to the action.... Although their attorney appeared at the hearing on the petition for the payment of the money to plaintiff's attorneys and objected to such payment, he did not ask that appellants be made parties, nor did the court order them brought into the action.
>
> ....
>
> The appeal is therefore dismissed ... [a]s appellants have no right to appeal....

Eggert, 20 Cal.2d at 201 (emphasis added).

INTRODUCTION

The modern class action resulted from major revisions to Rule 23 of the Federal Rules of Civil Procedure during the 1960s. Since then, class actions have become a major part of the civil litigation landscape.

Each year millions, if not tens of millions, of Californians are involuntarily brought into class action litigation as unnamed class members. These class members are usually unaware of the existence of the class action proceedings in which they are plaintiffs and their rights are adjudicated. Appeal is the only mechanism that allows unnamed class members to obtain judicial review of trial court decisions affecting their rights.

> Because trial judges who orchestrate settlements can be expected to approve them, the primary monitors of such settlements must [be] appellate judges.

Charles Silver, *Class Actions - Representative Proceedings*, Encyclopedia of Law & Economics 194, 216 (B. Bouckaert & G. De Geest, eds. 1999) (emphasis added).

The right of unnamed class members to appeal trial court rulings is a crucial procedural protection to ensure the integrity and proper functioning of the class action mechanism. As noted by Seventh Circuit Court of Appeal Judge Frank H. Easterbrook, basic issues of class action jurisprudence are often left unresolved:

> Because a large proportion of class actions settl[e] or [are] resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed.... But, the more fundamental the question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal....

Blair v. Equifax Check Services, Inc., 181 F.3d 832, 835 (7th Cir. 1999) (emphasis added).

The class action mechanism's approval process disposes of millions of Californians' property rights through the *res judicata* effect of class action judgments.

> Our Supreme Court recently cautioned that the class action device ... also carries with it substantial dangers of injustice to class members who <u>may be deprived of their rights by the actions of the class plaintiff</u>.

Trotsky v. Los Angeles Federal Savings and Loan Ass'n, et al., 48 Cal.App.3d 134, 149 [121 Cal.Rptr. 637] (2d App. Dist., Div. 5 May 6, 1975) (emphasis added).

The ruling of the Fourth Appellate District Court of Appeal in *Restoration Hardware*, requiring formal intervention, is contrary to the overwhelming holdings of appellate courts throughout California and contrary to unnamed class members' appellate standing requirements in the federal system. The ruling provides an unnecessary barrier to unnamed class members' efforts to protect the integrity of the class action mechanism.

A requirement of formal intervention through the filing of motions to intervene and to set aside the judgment (*Restoration Hardware*, 245 Cal.App.4th at 662) for unnamed class members who have already filed formal written objections to a proposed settlement or request for attorneys' fees and appeared at the fairness hearing to argue those objections requires the expenditure of needless time and effort. This applies not merely for unnamed class members/would-be appellants, but for class counsel, defendants, and California's trial and appellate court judges as well.

STATEMENT OF THE CASE

Michael Hernandez filed a class action complaint in the San Diego Superior Court against Defendant Restoration Hardware in 2008.

The complaint alleged that the Defendant violated Civil Code § 1747.08 of the Song-Beverly Credit Card Act of 1971 by requesting and recording ZIP codes from customers that used a credit card for purchasing items in Defendant's California retail stores. The plaintiff sought damages under the act and elimination of the practice.

The trial court, on September 29, 2014, entered a "Final Judgment" (AA 14), which finally disposed of all issues between the parties. (California Rules of Court (hereinafter CRC), Rules 8.100(a) and 8.204(a)(2)(B), and Code of Civil Procedure (hereinafter CCP) §§ 901 and 904.)

On November 24, 2014, Class Member/Appellant Muller (hereinafter Class Member Muller) filed a Notice of Appeal (AA 29) to the Final Judgment.

On March 14, 2016, the appellate court issued its published opinion, *Mike Hernandez, et al.; Francesca Muller 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), and without reaching the merits of any of Class Member Muller's arguments, dismissed Class Member Muller's appeal on the ground of standing.

A Petition for Review was filed in this Court on April 21, 2016, and granted on June 22, 2016.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This class action involves consumer purchases by credit cards of products from Defendant Restoration Hardware (RHI).

The detailed facts of this case are available in the "Factual and Procedural Background" contained in the *Restoration Hardware* opinion. This Statement will highlight the facts specifically relevant to this appeal, as well as note the inaccuracies in the court of appeal's "Factual and Procedural Background."[2]

Plaintiff Mike Hernandez filed a class action complaint in the San Diego Superior Court against Restoration Hardware, Inc., No. 37-2008-00094395-CU-BT-CTL, on October 21, 2008.

The complaint alleged Defendant RHI's violation of the Song-Beverly Credit Card Act, California Civil Code § 1747.08, in requesting and recording ZIP codes from customers who paid for merchandise with a credit card at retail stores located in California.

As a result of a motion for class certification filed on June 1, 2012, the trial court certified the following class:

> All persons from whom RHI requested and recorded ZIP Codes in conjunction with a credit card transaction in its California retail stores since October 21, 2007.

An undated "Notice of Pendency of Class Action" was e-mailed to Class Member Muller on June 4, 2013, which stated:

> To: All persons from whom Restoration Hardware, Inc. requested and recorded ZIP Codes in conjunction with a credit card purchase transaction in its California retail stores from October 21, 2007, through the present.

---

[2] Note errors identified at pages 10-13, *infra*.

> If you are a member of this class of persons, you should read this Notice carefully because it will affect your rights.
>
> ....
>
> If you are a member of the Class, you can either stay in the lawsuit and receive any benefits that the Class may receive or you can ask to be excluded from the Class. The last day to postmark a request for exclusion from the Class is August 3, 2013. For access to the full notice regarding this class action and other information about the case, including how to exclude yourself from the Class, go to www.rhizipcodeaction.com.

(AA 1.)

As the appellate court in *Restoration Hardware* noted:

> The June 2013 notice to potential class members advised them of the pending class action and explained they had the option of (1) remaining as part of the class and being bound by the judgment, or (2) excluding themselves from the class and not being bound by any judgment. <u>It also advised that, if they elected to remain in the class, they had the option of entering an appearance through counsel</u>.

Restoration Hardware, 245 Cal.App.4th at 654 (emphasis added).

In response to the "Notice of Pendency of Class Action," on June 19, 2013, Class Member filed a Notice of Appearance of Additional Counsel:

> The undersigned counsel hereby appears as additional counsel on behalf of Plaintiff Class Member Francesca Muller in the above-captioned class action. He requests that all future papers and pleadings be served upon him at the address stated below.

(AA 3.)

The issues regarding the class's damage claims were decided at a bench trial in January 2014. The trial court issued a "Proposed Statement of Decision and Judgment" (Respondents' Appendix to Opposition Brief

(hereinafter "RA") at 70) on March 7, 2014. It concluded that Defendants had violated the Song-Beverly Act of 1971 (Civil Code § 1747.08) and imposed a penalty for said misconduct. By virtue of the court's decision on the merits, a common fund of $36,412,350 was established.

The recovery to the class was described as follows:

> Class Members can elect to receive a $30.00 cash award for each confirmed violation, or a coupon that offers a potential savings of $3,300.00 off a purchase from RHI.

(Class Counsel's Mem. P&As in Support of Mot. for Award of Attorney Fees, etc., filed 7/18/14; see RA at 93:13-15.)

Class Plaintiffs subsequently filed a "Motion for an Award of Attorneys' Fees and Litigation Costs to Class Counsel and Service Awards to Class Representatives" (RA 87) on July 18, 2014, and a hearing date for September 5, 2014, was set.

Class Counsel requested a common fund attorneys' fee award of 25% from the class's recovery of $36,412,350.00, or $9, 103,087.50, as a reasonable attorneys' fee, along with litigation costs of $100,000 and incentive awards for the named Representative Plaintiffs in the amount of $25,000 each. A copy of said motion was sent to Class Member Muller by virtue of her having filed an appearance in response to the Notice of Pendency.

In their declaration in support of their fee request, Class Counsel described how they had directly negotiated a settlement of their fee request with the Defendant.

> 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.

(Decl. James R. Patterson in Support of Mot. for an Award of Attorneys' Fees, etc., filed 7/18/14; see RA at 122:12-14 .)

No notice was ever sent to unnamed class members, advising them that Class Counsel had sought a fee of 25% to be paid out of the class's recovery. Thusly, there was no mechanism for unnamed class members to file objections or even become aware that Class Counsel had sought $9.1 million from the class's recovery.

On September 2, 2014, Class Member filed, in response to Class Counsel's Motion for an Award of Attorneys' Fees, etc., a "Request for Clarification and to Appear Telephonically at the September 5, 2014, Hearing" (AA 5), stating:

> The parties' pleadings do not indicate that class members were notified of the settlement of the attorneys' fee issue and of the hearing on September 5, 2014, to approve Class Counsel's fee request.

(AA 6, ls. 2-4.)

On September 5, 2014, the trial court held a hearing at which Class Counsel and Defendant's counsel participated, as well as counsel for Class Member Muller, who objected to the court's approval of Class Counsel's fee request:

> At the hearing on the attorney fee application, Muller objected that considering the attorney fees application without first giving class members notice of the fee application and the right to appear and comment on the application was a violation of class action procedures because this fee award was "a settlement as regards to the attorneys' fees...."

Restoration Hardware, 245 Cal.App.4th at 656.

The Court of Appeal also correctly noted:

> [Class Member Muller] did not move to intervene in the action, or to join as an additional class

> representative, or to be substituted for Michael Hernandez and Amanda Georgino as class representative.

Restoration Hardware, 245 Cal.App.4th at 654.

After the hearing on September 5, 2014, the trial court issued a "Second Amended Minute Order," denying Class Member Muller's request for clarification and approving the fee and cost requests. (AA 11.)

On September 29, 2014, the trial court filed a Final Judgment (AA 14), granting Class Counsel $9,103,087.50 in attorneys' fees.

After obtaining a Final Judgment, the parties distributed a "Notice of Judgment in Class Action" (AA 25), advising class members of the prior January 2014 bench trial and its outcome and instructions for the claims process. <u>However, the Notice never advised class members of the award of attorneys' fees, costs, and service awards for the Representative Plaintiffs from the class's settlement fund</u>.

On November 24, 2014, Plaintiff Class Member Muller filed a Notice of Appeal (AA 29) in the Fourth Appellate District Court of Appeal of the trial court's Final Judgment.

On March 14, 2016, the Court of Appeal issued its published opinion, dismissing Class Member Muller's appeal on the ground of lack of standing without reaching the merits of her claim.

A Petition for Review was filed in this Court on April 21, 2016, and granted on June 22, 2016.

<u>Errors in the Court of Appeal's "Factual and Procedural Background"</u>

Four significant factual holdings in the *Restoration Hardware* opinion's "Factual and Procedural Background" (at 654) regarding events in the trial court are not supported by the record.

(a) The first incorrect factual finding by the appellate court was as follows:

> [A]nd the amount of the attorney fee award was not made by the parties during negotiations to which unnamed class members were not privy, but was instead made by the court as part of adversarial proceedings, which brings this action squarely within the holding of *Eggert* and also obviates one of the concerns articulated by *Powers*. (See *Powers, at p. 1256.*)

Restoration Hardware, 245 Cal.App.4th at 662 n.6 (emphasis added).

Just the opposite is true. The amount of the attorneys' fee was negotiated solely between Plaintiffs' counsel and Defendant's counsel (see reference to Decl. of James R. Patterson, pages 8- 9, *supra*) – a negotiation to which unnamed class members were not privy and knew nothing about.

(b) The second incorrect factual finding was that the amount of the fee was not determined by the trial court as part of an adversarial proceeding as the parties had previously entered into a private settlement of the issue.

(c) The third incorrect factual finding was the appellate court's conclusion that *Restoration Hardware* was on "all fours" with *Eggert*:

> *Eggert* appears to be on "all fours" with the present action: both involved a class action; both involved a matter litigated to judgment; both involved a challenge to the postjudgment attorney fee award to the counsel for the named plaintiff; both involved appellants who were members of the class, but not named parties, and who had appeared through counsel to object to the attorney fee award; and both involved members who took no steps to be added as

> named plaintiffs. Accordingly, under *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450 [20 Cal. Rptr. 321, 369 P.2d 937]*, we must adhere to *Eggert* and dismiss the appeal.

Restoration Hardware, 245 Cal.App. 4th at 659 (footnote omitted).

In making this finding, the appellate court ignores the issue of notice, a major argument raised in Class Member Muller's appeal. In the *Eggert* case, notice was provided to unnamed class members:

> The court also made an order, directed to plaintiff and all other persons interested, to show cause why it should not make an order fixing reasonable attorneys' fees. Notice of the order was published daily until the return date.

Eggert, supra, 20 Cal.2d at 200 (emphasis added).

Because the appeal concerned lack of notice prior to the award of attorneys' fees, it is perplexing that the *Restoration Hardware* court could find this case "on all fours" in its *Eggert* inquiry, ignoring this major factual dissimilarity. Unlike *Eggert*, it was only after the court approved the fee for Class Counsel (AA 14) and after the trial court entered the Final Judgment that the parties sent a "Notice of Judgment in Class Action" (AA 25) to class members, and then only advising class members of the terms of the court's decision on damages due to the class. Surprisingly, even this belated notice never mentioned the amount of the attorneys' fee that the trial court had awarded to Class Counsel from the class's recovery.

(d) The fourth incorrect factual finding was:

> Muller ... did not argue the *amount* the court's tentative ruling proposed to award was excessive.

Restoration Hardware, 245 Cal.App.4th at 656 (emphasis added).

Class Member Muller challenged the lodestar cross-check calculation by the trial court, and in so doing argued that the purported cross-check of the percentage used by the court allowed for the awarding of an excessive fee.

> Mr. Schonbrun: I also disagree with ... the statement in your opinion 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.
>
> The law is – and ... I don't believe that your opinion made clear that the lodestar approach is the reasonable number of hours that have been worked on the case, and that if multiplied by the prevailing market rate for the service rendered....
>
> 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 or, in this case, approximately 2.5 million.
>
> 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.

(Rep. Appeal Tr., 9/5/14, Vol. 1, at 23:3-28 – 24:1-4; emphasis added.)

LEGAL ARGUMENT

I.

THE *EGGERT* DECISION SHOULD BE RECONSIDERED

A. This Court's 74-Year-Old Decision in *Eggert* is a Remnant of a Bygone Era.

Eggert v. Pacific States Savings and Loan Company, supra, 20 Cal.2d 199, was a 1942 case that was decided before the major changes in Rule 23 were enacted in the 1960s, which created the modern class action.

> In the first period, from the 1966 amendments to *rule 23 of the Federal Rules of Civil Procedure* (28 U.S.C.), which "heralded the advent of the modern class action" (Walker & Horwich, *supra*, 18 Geo. J. Legal Ethics at p. 1453)....

(*Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 2016 Cal. LEXIS 6387 (Aug. 11, 2016).)

Class actions are handled quite differently in the federal courts and in California courts as well since *Eggert* was decided. As a consequence, *Eggert* should be reconsidered.

> We have repeatedly directed that in the absense of controlling state authority, California courts should utilize the procedures of *rule 23 of the Federal Rules of Civil Procedure* (28 U.S.C.) to ensure fairness in the resolution of class action suits.

Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1118 [245 Cal. Rptr. 658] (Apr. 7, 1988).

In light of the significant changes in California class action practice, ushered in by federal changes to federal Rule 23, the question of the necessity for intervention by unnamed class members should be reconsidered. As discussed herein (see pages 24-27, *infra*), the United States Supreme Court has resolved this question for federal courts; formal

intervention is not required for unnamed class members to have standing to appeal.

B. *Eggert* Did Not Consider the Public Policy Implications of Its Holding.

Eggert is a two-page decision. There is no policy justification in support of a formal intervention requirement. There is no explanation of how the requirement of formal intervention furthers justice under the class action mechanism. Indeed, the decision merely states:

> [I]t is a settled rule of practice in this state that only a party to the record can appeal.... Appellants were not named as parties to the action nor did they take any appropriate steps to become parties to the record.

Eggert, supra, 20 Cal.2d at 201.

Given the serious public policy considerations addressed by the cases discussed in this Opening Brief that reject formal intervention, the Court should determine whether the *Eggert* holding is appropriate to modern-day class action procedures.

C. An Overwhelming Number of Appellate Courts throughout California Have Not Followed *Eggert.*

Appellate courts throughout the State of California, since at least the 1975 *Trotsky* decision (*Trotsky, supra,* 48 Cal.App.3d 134) have, with few exceptions,[3] followed *Trotsky's* approach that formal intervention is not

---

[3]Shepardizing *Eggert* discloses only one published authority, *Sherman v. Allstate Ins. Co.*, 90 Cal.App.4th 121 [108 Cal.Rptr.2d 722] (2d App. Dist., Div. 7, June 25, 2001), and one unpublished opinion, *Santiago v. Kia Motors America, Inc.*, No. G036985, 2007 Cal. App. Unpub. LEXIS 4792 (4th App. Dist., Div. 3, June 15, 2007), relied on *Eggert* to support a holding that an unnamed class member in a class action needs to intervene in order to obtain appellate standing.

required. Rather, the filing of a formal pleading – objecting to a proposed settlement and/or attorneys' fee request (and appearing at the fairness hearing) – is sufficient to provide an unnamed class member with standing to appeal.

This Court should adopt the position of the otherwise nearly unanimous California courts of appeal (and join the federal appellate courts throughout the country) (see pages 17-23, *infra*) which have recognized appellate standing for unnamed class members who do not formally intervene but who file an objection and appear at a fairness hearing.

In the First Appellate District:

- 1984 decision in *Simons v. Horowitz, et al.*, 151 Cal.App.3d 834 [199 Cal.Rptr. 134] (1st App. Dist., Div. 3, Feb. 7, 1984);
- 1990 decision in *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117 [269 Cal.Rptr. 844] (1st App. Dist., Div. 2, May 25, 1990);
- 2008 decision in *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413] (1st App. Dist., Div. 1, Apr. 21, 2008);
- 2015 decision in *Roos v. Honeywell International, Inc.*, 241 Cal.App.4th 1472 [194 Cal.Rptr.3d 735] (1st App. Dist., Div. 1, Nov. 10, 2015).

In the Sixth Appellate District:

- 2001 decision in *Wershba v. Apple Computer*, 91 Cal.App.4th 224 [110 Cal.Rptr.2d 145] (6th App. Dist. July 31, 2001).

And, in an earlier Fourth Appellate District decision:

- 2006 decision in *Consumer Defense Group v. Rental Housing Industry Members,* 137 Cal.App.4th 1185 [40 Cal.Rptr.3d 832] (4th App. Dist., Div. 3, Mar. 24, 2006).

II.

THE *RESTORATION HARDWARE* DECISION, REQUIRING INTERVENTION BY UNNAMED CLASS MEMBERS TO OBTAIN APPELLATE STANDING, IS INCONSISTENT WITH MODERN CALIFORNIA CLASS ACTION JURISPRUDENCE

A. Numerous California Courts of Appeal Have Held That the Filing of an Objection and Appearance at a Fairness Hearing Are Sufficient for Unnamed Class Members to Obtain Appellate Standing.

1. The *Restoration Hardware* decision contradicts the Second Appellate District, Division Five's 1975 decision in *Trotsky v. Los Angeles Federal Savings & Loan Ass'n, et al.*, 48 Cal.App.3d 134 [121 Cal.Rptr. 637] (2d App. Dist., Div. 5, May 6, 1975), which held that:

> In response to notice of hearing on a proposed settlement of the class action, appellant entered an appearance and objected to the proposed settlement. The trial court overruled all objections and entered judgment approving the settlement.
> ....
> As a member of the affected class who appeared at the hearing in response to the notice, and whose objections to the proposed settlement were overruled, appellant is a party aggrieved, and has standing to appeal. (*Code Civ. Proc., § 902.*)
> ....
> As stated by the court in *Ace Heating & Plumbing Company v. Crane Company (3d Cir. 1971) 453 F.2d 30, 33* ... "So, without court approval and a subsequent right to ask for review, such claimants would be faced with equally unpalatable alternatives – accept either nothing at all or a possibly unfair settlement. We conclude that appellants have standing to appeal...."

Trotsky, 48 Cal.App.3d at 139 (emphasis added).

The *Restoration Hardware* court held that *Trotsky* improperly based its analysis on federal class action procedures rather than California case law:

> However, *Trotsky* did not ... make any effort to reconcile its conclusion with *Eggert's* holding that unnamed class members whose only appearance was to object to the attorneys' fees had no standing to appeal because they were not "parties" and did not avail themselves of the "ample opportunity ... to become parties of record...."
> ....
> Because *Eggert* teaches the "party" requirement of *Code of Civil Procedure section 902* is not met merely because the "aggrieved" requirement of *section 902* might *also* be satisfied as to a nonparty class member, we conclude *Trotsky's* analysis of standing is flawed and that *Trotsky* and its progeny ... should not be followed.

Restoration Hardware, 245 Cal.App.4th at 660-61, *citing* Eggert, 20 Cal.2d at 201; and at 661 (citations omitted), respectively.

2. The *Restoration Hardware* decision contradicts the Second Appellate District's decision in *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc.* (hereinafter *Mrs. Gooch*), 127 Cal.App.4th 387 [25 Cal.Rptr.3d 514] (2d App. Dist. Mar. 7, 2005).

Mrs. Gooch directly rejected the not-a-named-party argument upon which the *Restoration Hardware's* holding is based.

> At the threshold we reject Whole Foods' contention Giampietro lacks standing to appeal the court's order denying his motion for attorney fees because he was not a named party in Consumer Cause's lawsuit. A class member who appears at a fairness hearing and objects to a settlement affecting that class member has standing to appeal an adverse decision

> notwithstanding the fact that the member did not formally intervene in the action.

Mrs. Gooch, 127 Cal.App.4th at 395 (emphasis added).

It should be noted that the *Mrs. Gooch* court was aware of *Eggert* and even cited to it (*Mrs. Gooch* at 396), but in connection with the issue of whether the unnamed class member was an aggrieved party. It did not consider *Eggert's* "party to the record" reference applicable.

Restoration Hardware held that that *Mrs. Gooch's* reliance on *Trotsky* was improper.

> However, neither of the cases cited by Muller, *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* ... and *Wershba v. Apple Computer, Inc.* ..., made any effort to reconcile their conclusions with *Eggert*, and instead rooted their conclusions in the analysis contained in *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.*....
>
> ....
>
> [We] conclude *Trotsky's* analysis of standing is flawed and that *Trotsky* ... should not be followed.

Restoration Hardware, 245 Cal.App.4th at 660 and 661 (citations omitted).

3. The *Restoration Hardware* decision contradicts the Sixth Appellate District's decision in *Wershba v. Apple Computer*, 91 Cal.App.4th 224 [110 Cal.Rptr.2d 145] (6th App. Dist. July 31, 2001).

Wershba held:

> In the context of a class settlement, objecting is the procedural equivalent of intervening.
>
> ....
>
> Class members who appear at a final fairness hearing and object to the proposed settlement have standing to appeal.

Wershba, 91 Cal.App.4th at 253 and 235 (emphasis added), respectively.

The *Restoration Hardware* decision holds that because *Wershba* rests on the incorrectly decided *Trotsky* decision (see *Wershba* at 235, 236), it too should not be followed.

4. The *Restoration Hardware* court entirely ignored the decisions of other California appellate courts.

(a) It ignored the First Appellate District's 1990 decision in *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117 [269 Cal.Rptr. 844] (1st App. Dist., Div. 2, May 25, 1990), which contradicts the Restoration *Hardware* decision:

> [A]ll they [unnamed class members] have to do is appear as objectors at the fairness hearing and then take an appeal.

Rebney, 220 Cal.App.3d at 1131 (emphasis added).

Rebney (at 1128) relies on California statutes in cases and on federal practice (at 1131).

(b) It ignored the First Appellate District's decision in *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413] (1st App. Dist., Div. One, Apr. 21, 2008), which contradicts the *Restoration Hardware* decision:

> In fact, a class member who timely objects to a settlement has standing to appeal regardless of whether the member formally intervened in the action.

(*Chavez,* 162 Cal.App.4th at 51 (emphasis added)),

and relies on *Mrs. Gooch*:

> The points and authorities asserted, erroneously, that Ellis's appellate rights could only be preserved if she were allowed to intervene. In fact, a class member who timely objects to a settlement has standing to appeal regardless of whether the member formally intervened in the

> action. (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal.App.4th 387, 395 [25 Cal. Rptr. 3d 514].*)

Chavez, 162 Cal.App.4th at 51.

(c) It ignored the First Appellate District's 2015 decision *Roos v. Honeywell International, Inc.*, 241 Cal.App.4th 1472 [194 Cal.Rptr.3d 735] (1st App. Dist., Div. 1, Nov. 10, 2015), which held:

> [T]he objectors sufficiently demonstrated their standing by asserting in their objections that they were class members and by otherwise complying with the prerequisites for filing objections set forth in the notice of settlement.

Ibid. at 1483-84 (emphasis added).

Roos, 241 Cal.App.4th at 1484 n.4, relies on *Rebney* and *Wershba*:

> In the "context of a class settlement, objecting is the procedural equivalent of intervening." (*Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 253 [110 Cal. Rptr. 2d 145]* (*Wershba*).)

(d) It ignored the Fourth Appellate District, Division Three's decision in *Consumer Defense Group, v. Rental Housing Industry Members,* 137 Cal.App.4th 1185 [40 Cal.Rptr.3d 832] (4th App. Dist., Div. 3, Mar. 24, 2006), which contradicts the same district's Division One decision in *Restoration Hardware*:

> [I]t is enough that objectors appear and object to the settlement in the trial court for there to be a right to appeal.
>
> ....
>
> The plaintiff may or, as here, may not represent the public interest; the plaintiff, as here, may be nothing but a shell entity for lawyer bounty hunters.

Consumer Defense Group, 137 Cal.App.4th at 1207 (emphasis added) and 1206, respectively.

Given its relevance, it is surprising that *Restoration Hardware* does not even mention the *Consumer Defense Group* decision from its own Fourth Appellate District.

(e) It ignored the First Appellant District Court's decision in *Simons v. Horowitz, et al.*, 151 Cal.App.3d 834 [199 Cal.Rptr. 134] (1st App. Dist., Div. 3, Feb. 7, 1984), which contradicts the *Restoration Hardware* Decision:

> As a member of that class, Horowitz was an aggrieved party to the action.... Horowitz therefore did not need to obtain "permission" to intervene, and could simply appeal the trial court's judgment by filing a notice of appeal.

Simons, 151 Cal.App.3d at 843 (citation omitted; emphasis added).

Simons relies on state law and federal authorities as well as public policy. It does not mention *Trotsky.*

> "Absent class members are 'parties' for purposes of being bound by the judgment ... and having standing to appeal from decisions and object to settlements." (2 Newberg, *supra*, Rights and Obligations of Absent Class Members, § 2830, p. 1260.)
> ....
> As a member of that class, Horowitz was an aggrieved party to the action. Under California law, any party aggrieved may appeal an adverse judgment. (*Code Civ. Proc., § 902.*) Horowitz therefore did not need to obtain "permission" to intervene, and could simply appeal the trial court's judgment by filing a notice of appeal.
> ....
> "Ordinarily, aggrieved class members may appeal any final order of a district court in proceedings held pursuant to *Rule 23*. This general proposition holds true even though such class members have the right to

> exclude themselves from the class.... We conclude that appellants have standing to appeal in the circumstances here presented." (*Ace Heating & Plumbing Company v. Crane Company, supra, 453 F.2d at pp. 32-33.*)

Simons, 151 Cal.App.3d at 843.

5. Only one other published decision requires intervention by unnamed class members.

The Second Appellate District's decision in *Sherman v. Allstate Ins. Co.*, 90 Cal.App.4th 121 [108 Cal.Rptr.2d 722] (2d App. Dist., Div. 7, June 25, 2001), relies in part on *Eggert, supra*:

> *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, 90 Cal.App.4th at 127.

III.

THE *RESTORATION HARDWARE* COURT'S BASIS FOR ITS REJECTION OF *TROTSKY'S* REASONING IS SIMPLY WRONG

> *Trotsky*'s analysis is also flawed because it relied primarily on federal cases, including *Ace Heating & Plumbing Co. v. Crane Co.,* [453 F.2d 30 (3d Cir. Nov. 18, 1971)], in which the federal courts concluded an objecting class member had standing to appeal without seeking to be made a party to the proceedings below. However, it appears numerous federal courts have subsequently held that nonparty class members may *not* appeal a judgment.
>
> ....
>
> Thus, because *Trotsky* relies on federal authority that has been at least undermined by contrary federal authority ... we conclude the cases on which Muller relies should not be followed.

Restoration Hardware, 245 Cal.App.4th at 661 and 662.

However, *Restoration Hardware* is incorrect in holding that the federal precedent upon which *Trotsky* relied was in conflict. *Trotsky's* holding is in fact consistent with current federal authority, although the case it relied on, *Ace Heating & Plumbing Co. v. Crane Co.,* 453 F.2d 30 (3d Cir. Nov. 18, 1971), has indeed been superseded by the 2002 United States Supreme Court decision in *Devlin v. Scardelletti,* 536 U.S. 1 (June 10, 2002). (See discussion at pages 25-27, *infra.*)

A. The *Restoration Hardware* Court Incorrectly Found Inconsistency in Federal Authority Pertaining to Intervention.

1. The *Restoration Hardware* court's reliance on a purported inconsistency in federal authority on the subject of intervention is simply wrong.

> We acknowledge the federal decisions, even from the United States Supreme Court (compare *Marino v. Ortiz* (1988) 484 U.S. 301 [**nonparty class members** who did not seek to intervene may not appeal approval of settlement] with *Devlin v. Scardelletti* (2002) 536 U.S. 1 [reaching opposite conclusion without disapproving *Marino*]), are not uniform.

Restoration Hardware, 245 Cal.App.4th at 662 n.6 (bold and underline added). (Note that the *Restoration Hardware* court characterized *Marino v. Ortiz, et al.*, 484 U.S. 301 (Jan. 13, 1988), as involving "nonparty class members." This is factually incorrect.)

Presently, there is no lack of uniformity in the federal system on the issue of the necessity for intervention – *Marino* and *Devlin* are not in conflict. In fact, the United States Supreme Court, more than a decade ago in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), resolved whatever ambiguity may have existed on the issue of unnamed class member standing. *Devlin* held that unnamed class members were not obligated to intervene in order to obtain appellate standing.

> We hold that nonnamed class members like petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.

Devlin, 536 U.S. at 14.

2. *Restoration Hardware's* assertion that a comparison between the *Marino v. Ortiz*, 484 U.S. 301 (1988), and *Devlin v. Scardelletti*, 536 U.S. 1 (2002), decisions confirms a lack of uniformity at the Supreme Court level is based on a major misunderstanding of *Marino*. It ignores the fact that *Devlin* clarified *Marino* by pointing out that intervention was required in *Marino* because the appellants in *Marino* were not class members, either named or unnamed. They were persons who were outside

of the class definition. That is a crucial distinction, which the *Restoration Hardware* court failed to appreciate.

> We granted certiorari ... to resolve a disagreement among the Circuits as to whether nonnamed class members who fail to properly intervene may bring an appeal of the approval of a settlement.
>
> ....
>
> *Marino v. Ortiz, supra,* is not to the contrary. In that case, we refused to allow an appeal of a settlement by a group of white police officers who were not members of the class of minority officers that had brought a racial discrimination claim against the New York Police Department.
>
> ....
>
> We hold that nonnamed class members like petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.

Devlin, supra, 536 U.S. at 6, 9, and 14, respectively (emphasis added).

The Supreme Court determined that *Marino* dealt with a different issue and was not relevant to the status of an unnamed class member. *Marino* is not on point to the issue dealt with in *Restoration Hardware* and *Devlin* substantiates that conclusion.

3. It should also be noted that *Restoration Hardware* cites no post-*Devlin* legal authorities that support a purported lack of uniformity at the federal level on the issue of the necessity for intervention in order to obtain appellate standing for unnamed class members.

B. *Restoration Hardware* Adopts Rulings of Federal Courts of Appeals' Decisions That Were Effectively Overruled by *Devlin*.

The 1992 and 1998 federal authorities relied on by the *Restoration Hardware* decision, *Croyden Associates v. Alleco, Inc., et al.*, 969 F.2d 675

(8th Cir. July 13, 1992), and *Felzen v. Andreas, et al.*, 134 F.3d 873 (7th Cir. Jan. 21, 1998), have been superseded[4] by the 2002 *Devlin* decision as it pertains to unnamed class members' appellate status.

Restoration Hardware cites *Croyden Associates* and *Felzen*:

> However, it appears numerous federal courts have subsequently held that nonparty class members may *not* appeal a judgment. (See *Croyden Associates v. Alleco, Inc. (8th Cir. 1992) 969 F.2d 675, 678, 678-680* [noting the "circuits are divided on this issue, and some have inconsistent holdings"...]....).
>
> ....
>
> Finally, *Croyden* pointed out that class actions would become unmanageable and unproductive if each class member could individually appeal.
>
> ....
>
> [S]ee also *Felzen v. Andreas (7th Cir. 1998) 134 F.3d 873* [class members must intervene as parties in order to appeal from adverse decisions]....
>
> ....
>
> [A]ccord, *Felzen v. Andreas, supra, 134 F.3d 873* [class members must intervene as parties in order to appeal from adverse decisions].)

Restoration Hardware, 245 Cal.App.4th at 661, 662, 661, and 662, respectively.

Restoration Hardware's reliance on the superseded 1992 and 1998 federal cases is without merit.

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[4] Reliance on subsequently overruled authority is not limited to the *Restoration Hardware* court. See *Rodriguez v. Bethlehem Steel Corp., et al.*, 12 Cal.3d 382, 391[115 Cal.Rptr. 765] (Aug. 21, 1974), noting "[t]he phenomenon of reliance on subsequently overruled authority...."

IV.

THE *RESTORATION HARDWARE* COURT FAILED TO ADEQUATELY ANALYZE *MARSH*

The *Restoration Hardware* decision claims support from *Marsh v. Mountain Zephyr, Inc.*, 43 Cal.App.4th 289 [50 Cal.Rptr.2d 493] (4th App. Dist., Div. 1, Mar. 6, 1996), for its conclusion that formal intervention is required. (See *Restoration Hardware*, 245 Cal.App.4th at 657, 659 n.4, 662.) Reliance on *Marsh* is misplaced.

A. The *Restoration Hardware* Decision Cites to *Marsh v. Mountain Zephyr, Inc.* without Recognizing the Significance of the Word "Generally."

Marsh states:

> Thus, to have standing to appeal, a person generally must be both a party of record and sufficiently "aggrieved" by the judgment or order.

Marsh, 43 Cal.App.4th at 295 (emphasis added).

Restoration Hardware uncritically repeats the language "generally" from *Marsh* several times:

> [B]ecause we conclude the separate "party" element is absent here. (See, e.g., *Marsh, supra*, 43 Cal.App.4th at p. 295 ["to have standing to appeal, a person generally must be both a party of record and sufficiently "aggrieved" by the judgment or order"];....
>
> ....
>
> As a general rule, only parties of record may appeal....
>
> ....
>
> (See, e.g., *Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal.App.4th 289, 295 [50 Cal. Rptr. 2d 493]* (*Marsh*) ["to have standing to appeal, a person generally must be both a party of record and sufficiently 'aggrieved' by the judgment or order"].)

Restoration Hardware , 245 Cal.App.4th at 659 n.4 and 657, (emphasis added).

B. The *Restoration Hardware* Decision Ignores *Marsh's* Specifically Stated "Exception" to the General Rule.

Restoration Hardware fails to address the exception identified in Marsh that is precisely on point:

> One exception to the "party of record" requirement exists in cases where a judgment or order has a res judicata effect on a nonparty. "A person who would be bound by the doctrine of res judicata, whether or not a party of record, is ... [entitled] to appeal."

Marsh, 43 Cal.App.4th at 295 (citations omitted). *Accord, Life v. County of Los Angeles*, 218 Cal.App.3d 1287, 1292 [267 Cal.Rptr. 557] (2d App. Dist., Div. 3, Mar. 20, 1990); *Leoke v. County of San Bernardino*, 249 Cal.App.2d 767, 771[57 Cal.Rptr. 770] (4th App. Dist., Div. 2, Mar. 29, 1967); and *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America, et al.*, 141 Cal.App.4th 46, 58 [45 Cal.Rptr.3d 647] (2d App. Dist., Div. 8, July 6, 2006).

In *Restoration Hardware's* own words, unnamed class members are "bound by the judgment" (*Restoration Hardware*, 245 Cal.App.4th at 662). *Marsh* thus holds that they need not become "parties to the record" in order to have the right to appeal. *Restoration Hardware's* incorrect reliance on *Marsh* is therefore without merit.

V.

THE *RESTORATION HARDWARE* COURT'S ANALYSIS OF THE NINTH CIRCUIT'S DECISION IN *POWERS V. EICHEN* IS WRONG ON THE FACTS, WRONG ON THE LAW, AND WEAK ON PUBLIC POLICY

A. The *Restoration Hardware* Court's Discussion of *Powers* Contains Several Factual Inaccuracies.

The *Restoration Hardware* court's reference to *Powers v. Eichen*, 229 F.3d 1249 (9th Cir. Oct. 20, 2000) (see *Restoration Hardware*, 245 Cal.App.4th at 662) reflects a misunderstanding of the proceedings in the San Diego trial court in this case.

1. The *Restoration Hardware* decision mischaracterizes *Powers* by asserting "whatever merit Powers' rationale might have in the context of a proposed *settlement* of a class action...." (*Restoration Hardware* at 662 n.6.)

> For example, in *Powers v. Eichen (9th Cir. 2000) 229 F.3d 1249*, the court concluded that, at least in the context of a court approval of a proposed settlement of a class action, a nonparty class member could appeal without intervening. (*Id. at p. 1256.*)

(*Restoration Hardware* at 245 Cal.App.4th at 662 n.6).

This *Restoration Hardware* statement is wrong. The context of the *Powers* ruling did not involve a class action settlement – it concerned an appeal of an attorneys' fee award. The actual proceeding before the *Powers* court was the attorneys' fee request:

> We hold that because George filed an objection to the fee request in the district court, he has standing to pursue this appeal.

Powers v. Eichen, 229 F.3d at 1251; emphasis added.

2. Class Members in *Restoration Hardware* were not privy to the fee negotiation or award process (see pages 10-13, *supra*) regarding errors in the "Factual and Procedural Background" of the *Restoration Hardware* opinion. The amount of the attorneys' fee was set in a negotiation process between Class Counsel and Defendant. Unnamed class members were <u>not</u> privy to that process. (See pages 11-12, *supra*.)

The situation in *Restoration Hardware* was actually similar to that of *Powers*:

> Unnamed class members, who may not have been privy to the fee negotiations....

Powers v. Eichen, 229 F.3d at 1256. Despite that fact, *Restoration Hardware* incorrectly asserts that:

> [A]nd the amount of the attorney fee award was <u>not</u> made by the parties during negotiations to which unnamed class members were <u>not</u> privy....

Restoration Hardware Decision, 245 Cal.App.4th at 662 n.6, *relying on Powers v. Eichen*, 229 F.3d at 1256; emphasis added.

3. The judicial fee-setting process was not an adversarial proceeding. Defendant signed a negotiated agreement with Class Counsel to not oppose the fee request. Nonetheless, the *Restoration Hardware* decision citing to *Powers* fallaciously states:

> [A]nd the amount of the attorney fee award ... was instead made by the court as part of adversarial proceedings, which brings this action squarely within the holding of *Eggert* and also obviates one of the concerns articulated by *Powers*.

Restoration Hardware, 245 Cal.App.4th at 662 n.6, *relying on Powers v. Eichen,* 229 F.3d at 1256.

B. *Restoration Hardware's* Dismissal of the Reasoning in *Powers* Is Flawed.

The *Restoration Hardware* decision claims *Powers v. Eichen, supra,* failed to accurately analyze the intervention issue.

> However, the principal rationale for *Powers's* conclusion appears to have been the conclusion that conditioning the right to appeal on a class member's motion to intervene under Federal Rules of Civil Procedure Rule 24 would "create[] a procedural hurdle that would delay the ultimate resolution of the case and unnecessarily burden those involved." (*Powers,* at p. 1256.) *Powers* ignored that permitting unnamed class members to appeal a judgment without seeking to intervene would create the *same* delays and burdens....

Restoration Hardware, 245 Cal.App.4th at 662 n.6.

This is not true. Complaints in intervention – and subsequent motions to set aside the judgment – create additional delays and burdens not only for the prospective appellant but also for class counsel, the defendants, and the trial court (and potentially appellate court) judges. These are burdens and delays that are in addition to the burdens and delays of an appeal.

C. *Restoration Hardware's* Public Policy Arguments Are Inferior to Those of *Powers.*

Powers v. Eichen, supra, rejects the requirement of formal intervention on public policy grounds.

1. *Powers* rejects the alleged burden and delay arguments that appeal without intervention are claimed to impose.

> Requiring an appellant to intervene under Rule 24 of the Federal Rules of Civil Procedure in order to challenge an attorneys' fee award creates a procedural hurdle that would delay the ultimate resolution of the case and unnecessarily burden those involved. Assuring

> fair and adequate fee awards outweighs the danger that allowing appeals by non-intervening unnamed parties will complicate the settlement process.

Powers, 229 F.3d at 1256.

2. *Powers* notes the overarching importance of protecting unnamed class members.

> The court reasoned that: 1) the named class members' ability to represent the class "is likely to break down when the issue is the appropriate fee for her own lawyers";
>
> ...
>
> We agree with the Tenth Circuit. The procedural mechanisms of *Rule 23* do not protect unnamed class members concerned with the amount of a potential attorneys' fee award.

Powers, 229 F.3d at 1255-56, *citing Rosenbaum v. MacAllister*, 64 F.3d 1439, 1442-43 (10th Cir. Aug. 15, 1995).

3. *Powers* notes that even *Marino* recognized exceptions to the need for intervention in order to obtain appellate standing.

> "[B]ecause petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving that lawsuit's settlement."... The Court noted the circuit court's suggestion that "there may be exceptions to this general rule, primarily 'when the nonparty has an interest that is affected by the trial court's judgment,'" but held that "the better practice is for such a nonparty to seek intervention for purposes of appeal."
>
> ....
>
> "As members of the class, their legal rights are affected by the settlement and they have standing to sue."

Powers, 229 F.3d at 1252, *citing Marino v. Ortiz*, 484 U.S. at 304; and at 1254, *citing Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173, 1176 (9th Cir. 1977), respectively.

4. *Powers* observes that intervention is unnecessary as sufficient information exists in the circumstance where a party files a formal written objection and appears at the fairness hearing.

> Furthermore, when the appellant appears below and objects on the record, as occurred in this case, we ordinarily have sufficient information upon which to review the attorneys' fee award.

Powers, 229 F.3d at 1256.

VI.

THE *RESTORATION HARDWARE* DECISION'S PUBLIC POLICY ARGUMENTS CANNOT WITHSTAND SCRUTINY

> In the absence of effective representation of the defendant class by the designated representative, only the vigilance of absent class members such as Horowitz can protect those interests.

Simons, 151 Cal.App.3d at 844.

Restoration Hardware can only have the negative effect of dissuading unnamed class members from seeking appellate review when their rights are violated. Such a result can hardly be considered to be in the public interest. It is a hallmark of the class action mechanism that it is the responsibility of the judiciary to ensure the proper functioning of the class action mechanism.

> While the statements in *In re GM Trucks* and *Zucker* refer to the authority of district, not appellate, courts in connection with class action settlements, the cases make clear that reviewing courts retain an interest – a

> most special and predominate interest – in the fairness of class action settlements and attorneys' fee awards.

In re Cendant PRIDES Litig., 243 F.3d 722, 731 (3d Cir. Mar. 21, 2001) (emphasis added).

Restoration Hardware will impede the appellate review of class action settlements. The decision does not advance the public's interest in exposing poorly analyzed trial court decisions to appellate review.

A. The Purported Benefits of Intervention Asserted by the *Restoration Hardware* Decision Are Spurious.

The arguments put forward in the *Restoration Hardware* decision imply that class members and their objections when taken to courts of appeal are impediments to moving cases through the system. Instead of being the very reason for the existence of the class mechanism, class members who are not representative plaintiffs and who seek to enforce their appellate rights are treated as interlopers. The decision places the rights and interests of class members in a subordinate position to the named parties and the court.

1. The "putting the defendant on notice" argument.

> [F]urthermore, intervention would <u>put the class defendant on notice</u> of a possible appeal from the judgment.

Restoration Hardware, 245 Cal.App. 4th at 662-63 (emphasis added).

Clearly, the defendant would be on notice as a result of the filing of an objection and appearance at a fairness hearing by an unnamed class member. No additional notice is necessary.

2. The "clear avenue " argument.

> Intervention would have the effect of giving Muller a <u>clear avenue</u> from which to challenge the attorney fee award....

Restoration Hardware, 245 Cal.App.4th at 663 (emphasis added).

This rationale is simply untrue. In the federal system and in the other Appellate Districts in California, class members already have a "clear avenue" by filing an objection and appearing at the fairness hearing.

3. The "could not be ignored" argument.

> [B]ecause as a party Muller could not be ignored by the court, the class plaintiffs, or the class defendant....

Restoration Hardware, 245 Cal.App.4th at 663.

This rationale is simply untrue. By filing a formal written objection to a proposed settlement or fee request and appearing at the fairness hearing, under California Rules of Court objectors protect the recognition of their objection.

4. The "orderliness, efficiency, fairness" arguments.

> Intervention in the instant action would have permitted Muller to oppose the attorney fee award *and* preserve the objectives of the class action: orderliness, efficiency, and fairness to other class members.

Restoration Hardware, 245 Cal.App. 4th at 662.

The decision's formulation of "objectives of the class action: orderliness, efficiency, and fairness to other class members" (*id.*) is without specifics. Orderliness, efficiency, and fairness are in the eye of the beholder. No one would disagree with these objectives in the abstract; however, because these terms are so general, it cannot be determined how a formal intervention motion actually preserves these objectives. These same objectives, without a doubt, can be satisfied without requiring formal intervention.

5. The "unpalatable alternatives" argument.

In discussing *Trotsky, supra,* the *Restoration Hardware* court states:

> "'Rule 23 recognizes the fact that many small claimants frequently have no litigable claims unless aggregated. So, without court approval and a subsequent right to ask for review, such claimants would be faced with equally unpalatable alternatives— accept either nothing at all or a possibly unfair settlement.'"
>
> ....
>
> Similarly, we do not see how intervention would fail to address the "unpalatable alternatives" that animated the *Trotsky* court.

Restoration Hardware, 245 Cal.App. 4th at 660, *citing Trotsky,* 48 Cal.App.3d at 139 (internal citation omitted); and at 662, respectively.

However, the *Restoration Hardware* court creates a third "unpalatable alternative" with its holding. While the decision to appeal a class action settlement or fee cannot be taken lightly, and it is by no means an attractive option, to require intervention and motions to vacate the judgment make it even less attractive.

B. *Restoration Hardware's* Evaluation of the Relative Costs and Benefits of Intervention Is Unconvincing.

> Moreover, we believe a bright-line rule requiring party status to appeal a class action would be appropriate where the cost of intervention is minimal and benefits, to both the parties and to the court system, are substantial.

Restoration Hardware Decision, 245 Cal.App. 4th at 663.

By limiting its analysis of the benefits of intervention to only the parties and the court system, *Restoration Hardware* ignores the concerns of class members and the general public. This is the exact opposite of a public

policy argument. This view and the intervention requirement that results from it have been rejected by almost all California appellate courts. It was also rejected for all federal courts after serious review by the United States Supreme Court.

An objector's preparation and filing of pleadings to intervene and to set aside the judgment, and the concomitant preparation and filing of pleadings in opposition to those motions by class counsel and (most likely) the defendant's counsel, involve significant time, effort and expense. When the trial courts' time for hearings and producing rulings on those motions is added in, the requirement for intervention represents far more than a "minimal" commitment of legal resources.

The question must then be asked: what is gained through all this effort? The *Restoration Hardware* decision makes weak arguments in favor of intervention (see Nos. 1-5, pages 35-37, *supra*) and an unsupported general assertion that intervention furthers the objectives of the class action mechanism. *Restoration Hardware*, 245 Cal.App. 4th at 662-63.

Intervention has not been required of unnamed class members in the federal system since 2002, and in almost all California courts of appeal since 1975. *Restoration Hardware* offers no showing that unnamed class members in class actions have imposed any kind of burden on the courts, or in any way interfered with "orderliness, efficiency, or fairness to other class members." (*Restoration Hardware*, 245 Cal.App.4th at 662.)[5]

In point of fact, the *Restoration Hardware* decision imposes significant burdens on potential appellants and creates its own inefficiencies that impinge on everyone involved in the litigation. The

---

[5] Note that the references to burdens are only hypothetical: "[A] judgment could be delayed and burdened by appellate challenges mounted by numerous (or, as here, over 400,000) notices of appeal by disgruntled class members." (*Restoration Hardware*, 245 Cal.App.4th at 662 n.6.)

intervention procedure increases the workload of trial and appellate court judges, and leads to higher legal bills for defendants and higher plaintiffs' attorneys' fee requests. When a class member seeks to protect fellow class members from self-interested class plaintiffs' attorneys and named class plaintiffs, the requirement to intervene directly harms the class by complicating the path to appeal.

The *Restoration Hardware* decision understates the burdens imposed by intervention, while presenting extremely weak benefits in its favor. Because the class action mechanism is a judicially created procedure, the well-being of the class relies on the courts to create a fair system of adjudication. Unnecessarily complicating access to appellate courts cannot be justified on public policy grounds.

VII.

RESTORATION HARDWARE'S LEGAL ANALYSIS IS FLAWED

A. Intervention by Unnamed Class Members Is Superfluous.

According to *Restoration Hardware*, an unnamed class member must file a complaint in intervention and a motion to vacate the judgment:

> "Appellants had ample opportunity even after the court had made its orders to become parties of record by moving to vacate the orders to which they objected."

> (*Restoration Hardware* Decision, 245 Cal.App.4th at 659, *citing Eggert*, 20 Cal.2d at 201),

and, if denied, appeal the denial of those motions. This is all an unnecessary expenditure of the parties' time and judicial resources.

The California Code of Civil Procedure (CCP) recognizes two forms of intervention: a permissive intervention, CCP 387(a):

> Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding.

and an intervention by right, CCP § 387(b). CCP § 387(b) recognizes the ability of individuals that have been affected by a judgment to intervene as of right. Unnamed class members in class actions have the unfettered right to intervene as their rights are clearly at issue in class action settlements. Intervention by an unnamed class member who files an objection and attends a fairness hearing must be granted as a matter of right.

> [I]f the person seeking intervention claims an interest relating to the property to transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties, the court shall, upon timely application, permit that person to intervene.

CCP 387(b) (emphasis added).

An unnamed class member who has objected to the approval of a settlement and/or attorneys' fee request will, by definition (because he or she is a class member, even if unnamed) be affected by the judgment. Because an objector to the approvals sought by class counsel and the representative plaintiff cannot be represented by the existing parties who favor approval of the settlement or attorneys' fees to which the class member objects, permissive intervention is justified as well. There is no point in requiring such an unnamed class member/objector to go through the motions (no pun intended) of a process whose outcome is mandated by law.

B. The Substitution of an Objecting Class Member for the Representative Plaintiff Is a Red Herring.

> First, unnamed class members cannot represent the class absent the procedures outlined in Rule 23 because the trial court has not conducted hearings to determine whether the appellants would satisfactorily represent the interests of the other class members.

Restoration Hardware Op. at 661-62 (emphasis added), citing *Croyden Associates v. Alleco, Inc., supra*, 969 F.2d at p. 678.

An unnamed class member who objects to a class action settlement or attorneys' fee award does not need to represent the class in order to file a valid objection and pursue it on appeal. Class action procedures allow for any unnamed class member to file an objection on his or her own behalf; representing the class is irrelevant to the objection process. No unnamed class member was required to replace a lead plaintiff or become a co-lead plaintiff in *Restoration Hardware*. This was never an issue in the case.

C. The "Active Party" Argument Is a Red Herring.

> The class action structure relieves the unnamed class members of the burden of participating in the action, hiring counsel, and incurring costs.... Indeed, "[t]he structure of the class action does not allow absent class members to become active parties, since 'to the extent the absent class members are compelled to participate in the trial of the lawsuit, the effectiveness of the class action device is destroyed.'"

Restoration Hardware Decision, 245 Cal.App.4th at 657-58, *citing Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434 [95 Cal.Rptr.3d 57] (internal footnote omitted) (emphasis added).

The cited argument conflates the objection process with the prosecution of the litigation. The two are entirely distinct. Class member-

objectors need not become "active parties" to prosecute the litigation. However, in objecting to a class action, an unnamed class member must become actively involved in the litigation because he/she must file a notice of objection and appear at the fairness hearing, either personally or through counsel to present the objections. See discussion, pages 43-44, *infra*, regarding CRC Rule 3.769(f).

D. The Option of Opting Out Is Not Helpful in Class Actions.

> [A]dhering to *Eggert*'s approach would not leave nonparty class members without protection or appellate recourse. Under California law, where class members are given the option of opting out, they are not bound by the judgment in the class action but instead may pursue their own action.

Restoration Hardware , 245 Cal.App.4th at 662-63 (emphasis added).

This statement ignores the fact that opting out is typically required no later than the time to file objections, before the court has ruled on any objection. Indeed, in the instant case, the June 2013 Notice of Pendency of Class Action, advising class members of their right to exclude themselves from the litigation:

> [Y]ou can ask to be excluded from the class. The last day to postmark a request for exclusion from the Class is August 3, 2013.

(AA 1; emphasis added) (see page 7, *supra*) occurred well before the January 2014 bench trial took place. The opt-out procedure is not a protection for class members dissatisfied with a court's rulings because it occurs in advance of any rulings on the proposed settlement or attorneys' fee request.

Furthermore, in offering class members the option to "pursue their own action," it is, for the most part, useless.

> Rule 23 recognizes the fact that many small claimants frequently have no litigable claims unless aggregated.

Restoration Hardware Decision, 245 Cal.App.4th at 660, citing *Trotsky*, *supra*, 48 Cal.App.3d at 139 (internal citation omitted).

Unless one is pursuing a separate class action, all opting out does is eliminate any possibility of a recovery. It is not a helpful option for unnamed class members.

E. The Appellate Court's Reference to "Or to Join As an Additional Class Representative, or to Be Substituted for Michael Hernandez and Amanda Georgino As Class Representative" Reflects a Lack of Familiarity with the Class Action Settlement Process.

The *Restoration Hardware's* reference "or to join as an additional class representative or to be substituted for Michael Hernandez and Amanda Georgino as Class Representative" (*Restoration Hardware*, 245 Cal.App.4th at 654) refers to an unnamed class member who replaces a lead plaintiff or becomes a co-lead plaintiff, which is a different circumstance from rules regarding objections. (See discussion regarding CRC Rule 3.769(f) in section F below.) This argument exhibits a misunderstanding of the process by which class members' objections are handled under the modern implementation of the class action mechanism.

F. The Law Is Clear on Unnamed Class Member Objections.

The class action procedure of formal written objections satisfies what a motion to intervene would accomplish.

> If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. <u>The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in</u>

> arranging to appear at the settlement hearing and state any objections to the proposed settlement.

CRC, Rule 3.769(f), "Notice to class of final approval hearing" (emphasis added).

The filing of a formal written objection and attendance at the fairness hearing are sufficient to raise any issue that the parties or the court would need regarding the "standing"[6] of an unnamed class member and potential appellant.

> Furthermore, when the appellant appears below and objects on the record, as occurred in this case, we ordinarily have sufficient information upon which to review the attorneys' fee award.

Powers v. Eichen, 229 F.3d at 1256.

In imposing unnecessary burdens on unnamed class member appellate rights, the judiciary is abdicating its obligation to protect the proper functioning of the class action mechanism. The right of appeal is an important procedural protection for the proper functioning of the class action mechanism.

The class action mechanism is a judicially created procedure, instituted to benefit consumers and members of the public generally. Deterring access to appellate courts is not a valid judicial policy for people whose rights are being deprived by this form of litigation.

The *Restoration Hardware* court's imposition of an obligation on unnamed class members to file motions to intervene and set aside the judgment creates the very burdens and delays it claims it seeks to avoid.

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[6] See Argument VIII, page 45, *infra*) regarding the question of whether standing is indeed the appropriate method of legal analysis on this issue.

VIII

THE COURT SHOULD CONSIDER WHETHER THE TERM "STANDING" APPLIES TO CALIFORNIA APPELLATE RIGHTS

In addition to reconsidering its *Eggert* intervention holding, there is a subtle area of law that this Court could take the opportunity to resolve. It concerns the Court's use of the term "standing" in the grant of Review.

> Must an unnamed class member intervene in the litigation in order to have *standing* to appeal? (See *Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199.)

California Supreme Court, www.courts.ca.gov/supremecourt.htm, Case Search Information, No. S233983, Case Summary (emphasis added).

The Court's attention is directed to *Jasmine Networks, Inc. v. The Superior Court of Santa Clara Co.*, 180 Cal.App.4th 980 [103 Cal.Rptr.3d 426] (6th App. Dist. Dec. 29, 2009). Although discussing standing in the context of standing to sue, *Jasmine* appears to be applicable to appellate standing as well. It argues that standing is a federal concept arising out of Article III of the United States Constitution and thus is not relevant to California.

> This [standing] concept "has been largely a creature of twentieth century decisions of the federal courts."... It is rooted in the *constitutionally limited subject matter jurisdiction* of those courts.... (...["The threshold requirements are attributed to the 'case' and 'controversy' terms that define the federal judicial power in Article III..."].)
>
> ....
>
> "There is no similar requirement in our state Constitution...."

Id. at 990 (citations omitted).

If *Jasmine* is correct, standing is not a valid description of the legal principles involving appellate rights in the State of California. Rather, standing is a term that should relate only to federal law. It would advance the understanding of the law if this Court clarified whether "standing" is an appropriate term in California courts.

Interestingly, in *Devlin v. Scardelletti,* the United States Supreme Court noted that even in the federal context, standing is not the appropriate legal concept to analyze the appellate rights of unnamed class members to appeal:

> Although the Fourth Circuit framed the issue as one of standing, [*Scardelletti v. Debarr, 265 F.3d 195 (4th Cir. 2001),*] *at 204,* we begin by clarifying that this issue does not implicate the jurisdiction of the courts under Article III of the Constitution.
>
> ....
>
> Nor do appeals by nonnamed class members raise the sorts of concerns that are ordinarily addressed as a matter of prudential standing....

Devlin, 536 U.S. at 6 and 7, respectively.

It appears that according to Devlin, the standing concept is even an incorrect tool of analysis in the federal system as regards appellate jurisdiction to hear appeals of unnamed class members who have not intervened. *Devlin* distinguishes between a right to appeal and standing. *Devlin* supports the distinction raised in the *Jasmine* case.

Federal analysis under *Devlin* and the California arguments stated in *Jasmine* both argue that standing is an incorrect analytic framework for determining an unnamed class member's ability to appeal the approval of a class action settlement or attorneys' fee request without formal intervention.

CONCLUSION

The class action is a judicial creation. California courts have a special role in ensuring that the rights of unnamed class members in the appellate process are protected.

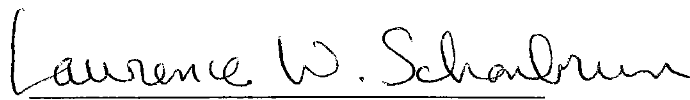
> "The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement." (4 Newberg on Class Actions [(4th ed. 2002)] § 11:41, p. 118....) "The courts are supposed to be the guardians of the class." (Dickerson, Class Actions: The Law of 50 States (2008 supp.) § 9.02[2], p. 9-6.)

Kullar v. Foot Locker Retail, Inc., et al., 168 Cal.App.4th 116, 129 [85 Cal.Rptr.3d 20] (1st App. Dist. Oct. 14, 2008).

The *Restoration Hardware* decision is based on misstatements of the trial court record and flawed legal analyses of state and federal law. Class Member Muller respectfully requests the Court overturn *Restoration Hardware's* reliance on *Eggert.*

Dated: September 19, 2016.

Respectfully submitted,

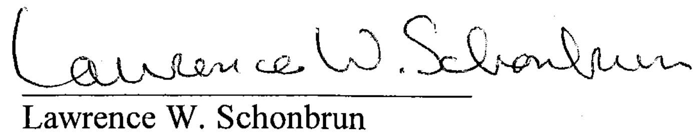


Lawrence W. Schonbrun
Attorney for Plaintiff-Appellant and
Petitioner Francesca Muller

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the attached Appellant Francesca Muller's Opening Brief on the Merits contains 11,432 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: September 19, 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 September 19, 2016, I caused to be served a copy of the following document:

APPELLANT FRANCESCA MULLER'S
OPENING BRIEF ON THE MERITS

_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:

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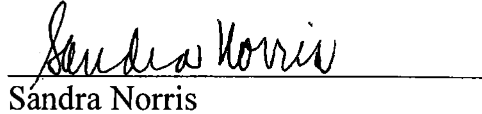
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 19, 2016, at Berkeley, California.



Sandra Norris