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 by the Court of Appeal of the State of California
Fourth Appellate District, Division One
Case No. D067091

On Appeal from the Superior Court of the County of San Diego
The Honorable William S. Dato
Case No. 27-2008-00094395-CU-BT-CTL

ANSWER TO APPELLANT FRANCESCA MULLER'S OPENING BRIEF ON THE MERITS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of the class action procedure is to make litigation fair and efficient when a large number of litigants have a claim involving common facts and law. The efficiency of class actions relies on the willingness of class representatives and class counsel to fairly and adequately represent the interests of the class. The fairness of class actions is safeguarded by fiduciary duties imposed under California law on class representatives, class counsel, and the trial courts to ensure that they are guided in the litigation by the best interests of the class.

The question here is whether an unnamed class member, who has no fiduciary duty to the class, should be allowed to appeal a class action judgment, whether reached through settlement or on the merits, without first seeking to intervene as a party. The answer to this question, as already decided by this Court in *Eggert v. Pacific States Savings & Loan Co.* (1942) 20 Cal.2d 199 [124 P.2d 815], should be no.

Petitioner has not provided this Court with any reason to overturn *Eggert*. Requiring unnamed class members to intervene as parties prior to appealing a class judgment is not only the existing law in California; it is good policy that promotes the fairness and efficiency of class actions.

Intervention allows the trial court to develop a complete record on the relevant issues for appeal, including requiring the objecting class member to articulate fully the grounds for her objections. The trial court is most familiar with the class representative, the course of the litigation, and the proposed settlement or fee award following a merits determination. The trial court also has the opportunity to make adjustments that may satisfy potentially meritorious objections without requiring significant delay or

additional expense. An intervention requirement requires objectors to make their best case to the trial court first.

Requiring an objecting class member to become a party also helps safeguard the integrity of the class action device by coupling the right to appeal with the responsibilities to the class intended to be borne by a named plaintiff. Divorcing the responsibilities of a named plaintiff from the right to appeal provides an incentive for professional objectors to file frivolous appeals that delay and threaten suitable class relief.

The intervention process allows the district court to distinguish between: 1) objecting class members who make a credible showing that in pursuing their objections they intend to act and are capable of acting on behalf of and in the interest of all class members; and 2) objecting class members who do not make such a showing (or, worse, are proceeding in an effort to extract a fee by lodging a generic and unhelpful protest).

The latter is exactly what is happening in this case, which was tried on the merits before an experienced and highly respected judge, who entered judgment and awarded the benefits provided to the Class. Petitioner and her counsel – a well-known "professional objector – entered an appearance in the case when the class was certified. They sat on the sidelines waiting for a settlement, which they undoubtedly would have objected to regardless of the terms. But the case never settled. Instead, it went to trial and the court determined and awarded penalties. Undeterred, Petitioner and her counsel requested "clarification" of the order, failing even to file a written objection before the hearing on attorney fees. They have now filed a frivolous appeal that Respondents and Class Counsel have spent more than $100,000.00 in costs and time to defend over the last two

years. When Respondents prevail, Petitioner and her counsel will walk away without any consequences for their frivolous appeal.

Respondent respectfully requests that the Court affirm the decision below dismissing Petitioner's appeal because she is not a party pursuant to Code of Civil Procedure section 902.

STATEMENT OF THE CASE

Respondent Michael Hernandez filed this case on October 21, 2008, alleging that Defendant violated the Song-Beverly Credit Card Act, Civil Code section 1747.08, by requesting and recording ZIP codes from credit card consumers. (*Hernandez v. Restoration Hardware, Inc.* (2016) 45 Cal.App.4th 651, 654 [199 Cal.Rptr.3d 719].) Several years later, after the case worked its way up to this Court and back, the trial court certified a class and appointed Michael Hernandez and Amanda Georgino as class representatives. (*Ibid.*) The trial court appointed Patterson Law Group, APC and Stonebarger Law, APC as Class Counsel. (*Ibid.*)

Class members received notice of the pending class action by direct mail and email in June 2013. (*Hernandez, supra*, 45 Cal.App.4th at p. 654.) The notice advised Class members that they had the option to either: 1) remain in the Class and be bound by any judgment; or 2) opt out of the Class and not be bound by any judgment. (*Ibid.*) In response to the notice, Mr. Lawrence Schonbrun entered an appearance in the action on behalf of Petitioner Francesca Muller. Petitioner never took any action to intervene formally in the case, or join as a class representative. (*Ibid.*)

After a bench trial, the trial court found that Restoration Hardware committed as many as 1,213,745 violations of Civil Code section 1747.08 during the class period, and awarded a penalty of $30.00 per violation.

(*Hernandez, supra*, 45 Cal.App.4th at p. 654.) The total number of violations was subject to reduction according to a claims process. (*Id.* at 655.) The trial court ordered the parties to meet and confer regarding that process. (*Ibid.*)

At the trial court's direction, the parties stipulated to a claims process that the trial court adopted in the final judgment. (*Hernandez, supra*, 45 Cal.App.4th at p. 655.) The claims process adopted the trial court's finding that each class member is entitled to $30 per violation, but also expanded Class members' rights substantially:

- Defendant stipulated to a final judgment amount of $36,412,350 based on the ***maximum number*** of 1,213,745 violations at $30.00 per violation;
- Defendant waived any right to appeal the judgment;
- Class members had the option of submitting a claim form for $30 per violation; and
- Known Class Members received a freely transferable coupon worth up to $3,333.33, even if they did not submit a claim form.[1]

(*Ibid.*) Appellant did not object to the Final Statement of Decision or the proposed claims process.

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[1] These coupons proved to be extremely valuable and marketable. Class members sold them for more than $500.00 on popular websites like craigslist.com and ebay.com. Because they were so popular, the actual total payout by Restoration Hardware, including redeemed coupons was more than $63,500,000.00, almost twice the final judgment of $36,412,350.00. (Respondents' Request for Jud. Notice, Ex. 1.)

Class Counsel filed a motion for attorney fees in the amount of $9,103,087.50, or 25% of the $36,412,350.00 judgment amount. Defendant agreed not to oppose a request up to this amount. (*Hernandez, supra*, 45 Cal.App.4th at p. 655, fn. 2.) At the trial court's request, Class Counsel supplemented the motion with a traditional lodestar calculation. (*Id.* at p. 655.) The lodestar analysis showed that Class Counsel expended over 3,500 hours and nearly $2.7 million in fees and costs up to that date, and provided detailed information regarding which attorneys worked on the case, the hours they spent on various tasks, and the reasonableness of their hourly rates.[2] (*Id.* at pp. 655-56.)

Respondents served the attorney fee motions on Petitioner. (*Hernandez, supra*, 45 Cal.App.4th at p. 656.) Petitioner did not file an objection or opposition to Respondents' motion for attorney fees. (*Ibid.*) Petitioner filed a "Request for Clarification," asking the Court to clarify whether Class members would receive notice of the fee application and a right to comment or appear at the hearing. (*Ibid.*)

At the hearing on the motion for attorney fees, Petitioner argued that class members should receive notice of the attorney fee application and be given an opportunity to appear and comment on the fee request. (*Hernandez, supra*, 45 Cal.App.4th at p. 656.) Petitioner claimed that the fee award was a negotiated settlement. (*Ibid.*) Petitioner argued that the trial

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[2] The amount of hours spent on this case has increased substantially due to significant post-trial work with class members and the implementation of the claims process, which required numerous briefs and hearings with the trial court, as well as the substantial work associated with this appeal. The work on this appeal alone is in excess of 150 hours.

court must determine the attorney fee award using the lodestar method, as opposed to a percentage of the fund method. (*Ibid.*) Petitioner did not argue that the amount of attorney fees awarded in the trial court's tentative ruling was excessive. (*Ibid.*)

The trial court awarded Class Counsel $9,103,087.50 in attorney fees. (*Hernandez, supra*, 45 Cal.App.4th at p. 656.) Petitioner filed a timely notice of appeal. (*Ibid.*)

PETITIONER'S CLAIMED ERRORS IN THE APPELLATE COURT'S OPINION

Petitioner claims that the appellate court erred in four factual findings in the *Hernandez* opinion. The appellate court's findings were correct and based on the record.

Petitioner claims that the appellate court erred by stating at footnote 6 that "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*." (*Hernandez, supra*, 245 Cal.App.4th, at p. 662, fn. 6.) Petitioner is wrong. The attorney fee award was not negotiated as part of a settlement on the merits. A clear sailing agreement was reached ***after*** the trial court determined the merits of the class members' claims through an adversarial process. (*Id.* at p. 655.) And the "clear sailing" agreement was nothing more than a concession by Class Counsel to accept a minimum percentage (25%) of the court-determined judgment in exchange for Restoration Hardware's agreement

not to appeal the judgment. Class Counsel would have otherwise requested at least 33% of the judgment considering they litigated the case for more than five years before trial.

Petitioner claims that the appellate court's 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." (Petitioner's Opening Brief, at p. 11.) This is simply a restatement of the first allegedly incorrect factual finding. The appellate court correctly found, as stated above, that the attorney fee award was determined as part of an adversarial proceeding.

Petitioner claims that the appellate court erred in concluding that this case is on "all fours" with *Eggert*, because notice by publication was provided to unnamed class members in *Eggert* prior to determination of the attorney fee award. There was no issue in *Eggert*, however, regarding whether or not notice to the class was required before awarding an attorney fee. *Eggert* cannot and does not support Petitioner's argument that separate notice to class members is required before a court can award attorney fees in any class action litigation.

Petitioner claims that the appellate court erred in finding that Petitioner did not object to the amount of the attorney fee award. The record demonstrates, however, that this finding is accurate. At the hearing on the motion for attorney fees, Petitioner admitted that she had not even reviewed Class Counsel's lodestar analysis, so she could only "guess" as to whether the lodestar submission was sufficient. (R.T., at pp. 22:11 - 24:14.)

Having ignored that submission, Petitioner had no basis for challenging the amount of the fee award.

LEGAL DISCUSSION

EGGERT IS GOOD LAW AND POLICY, AND SHOULD NOT BE OVERTURNED

A. *Eggert* Governs Here

In *Eggert,* the California Supreme Court dismissed the appeal of two class members who objected to an award of attorney fees, holding that unnamed class members are not "parties" to the record with a right to appeal. (*Eggert, supra*, 20 Cal.2d at p. 199.) After entering judgment for the class in the amount of $1.85 million, the trial court in *Eggert* awarded attorney fees to class counsel as a percentage of the total recovery. (*Ibid.*) The class representative subsequently petitioned for an order to distribute the judgment to class members after deducting the attorney fees. (*Ibid.*) At the hearing on that petition, two unnamed class members appeared through an attorney and objected to the attorney fees award. (*Ibid.*) The trial court granted the class representative's petition, and the unnamed class members filed an appeal on behalf of themselves and all other class members. (*Ibid.*) The class representative moved to dismiss the appeal. (*Ibid.*)

The California Supreme Court dismissed the appeal on the ground that "it is a settled rule of practice in this state that only a party to the record can appeal." (*Eggert, supra*, 20 Cal.2d at p. 201.) The Court held that the unnamed class members failed to take appropriate steps to become parties to the record. (*Ibid.*) Merely appearing at the hearing on attorney fees was insufficient to create standing. (*Ibid.*) Instead, the appellants should have moved to vacate the judgment and then appealed from the order denying

the motion to vacate. (*Ibid.*; *see also County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736 [97 Cal.Rptr. 385, 488 P.2d 953] ["[O]ne who is legally 'aggrieved' by a judgment may become a party of record and obtain a right to appeal by moving to vacate the judgment."].) Because the *Eggert* class members did not do so, they were not parties to the record and lacked standing to appeal, either on behalf of themselves or the other class members. (*Eggert*, *supra*, 20 Cal.2d at p. 201.)

Eggert governs here, and the appellate court correctly held that it compelled dismissal. Petitioner did not take any steps to become a party to the record. Petitioner did not ask to be named a class representative, or demonstrate any willingness to take on the responsibilities and risks of a class representative. Nor did Petitioner move to vacate the final judgment. As Petitioner was advised in the class notice, by deciding to stay in the Class, she was bound by the judgment.

B. *Eggert* Protects the Fairness and Efficiency of Class Actions

"The class action is a product of the court of equity – codified in section 382 of the Code of Civil Procedure. It rests on considerations of necessity and convenience, adopted to prevent a failure of justice." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458 [115 Cal.Rptr. 797, 525 P.2d 701].) Class actions are governed by standards set forth in the California Rules of Court and a substantial body of case law that are designed to protect the interests of unnamed class members in litigation.

California Rules of Court, rules 3.760-3.771 include requirements for providing notice to class members of pending actions, settlements, and judgments. Case law imposes fiduciary duties on the trial court, class counsel, and class representatives to ensure that the litigation proceeds in

the best interest of absent class members. (*See, e.g., Laffitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 510 [205 Cal.Rptr.3d 555, 376 P.2d 672] [trial court acts as a fiduciary "guarding the rights of absent class members"]; *La Sala v. American Savings & Loan Assn.* (1971) 5 Cal.3d 864, 871 [97 Cal.Rptr. 849, 489 P.2d 1113] [class representative acts as a fiduciary for the absent class members]; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 [85 Cal.Rptr.3d 20] [trial court must conduct an independent and objective analysis of a proposed class settlement "to protect the interest of absent class members].)

Eggert is part of this body of case law that protects the fairness and efficiency of class actions. By requiring an unnamed class member to intervene formally as a party prior to filing an appeal, *Eggert* ensures that any appellant is willing to act in the best interest of the class, not in his or her own interest, and accept the burdens and benefits of a class representative.

Without this protection, any class member can appeal without intervention and hold up (or thwart entirely) relief to a class that has been vetted and approved by a fiduciary court, a fiduciary class representative, and a fiduciary counsel, without imposing any obligation or duty on the appellant to act in the class' best interest rather than his or her own.

Allowing class members to appeal a class judgment without committing to represent the class creates an incentive for professional objectors to file frivolous appeals. These repeat objectors appeal class settlements in order to extract a payment in exchange for a dismissal of the appeal. Some legal scholars refer to objector payments as "blackmail." (*See*

Fitzpatrick, *The End of Objector Blackmail?* (2009) 62 Vand. L.Rev. 1623, 1634 [noting that meritless objections "can disrupt settlements by requiring class counsel to expend resources fighting appeals, and, more importantly, delaying the point at which settlements become final."].) Courts have described objector payments as a "tax" on class action settlements:

> The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

(*Barnes v. FleetBoston Fin. Corp.* (D.Mass. Aug. 22, 2006, No. 01-10395) 2006 U.S.Dist. LEXIS 71072, at *3.)

"Professional" objectors undermine the public interest served by class actions:

> In at least two ways, professional objectors harm the class members whose interests they claim to represent. First, professional objectors' almost invariably groundless objections delay the provision of relief to class members who, in most instances, have already waited years for resolution. Second, by feeding off the fees earned by class counsel who took the risk of suing defendants on a purely contingent basis, as is the normal practice in class actions, professional objectors create a disincentive for class counsel to take on such risky matters. That disincentive clashes with the public interest, repeatedly recognized by courts, to incentivize class counsel to handle such cases.

(Greenberg, *Keeping the Flies out of the Ointment: Restricting Objectors to Class Action Settlements* (2010) 84 St. John's L.Rev. 949, 951.) *Eggert's*

intervention requirement acts to discourage professional and frivolous objections, and thereby protects the integrity of the class action procedure.

1. Objecting Class Members Should Not Be Allowed to Appeal Unless They Are Willing to Join as Parties

The role of the class representative is critical to ensuring the fairness and efficiency of class actions. In *La Sala*, this Court recognized that "[w]hen a plaintiff sues on behalf of a class, he assumes a fiduciary obligation to the members of the class, surrendering any right to compromise the group action in return for an individual gain." *La Sala, supra,* 5 Cal.3d at p. 871. Class representatives also take on the heavy responsibility for payment of fees and costs to the defendant if the class does not prevail in the litigation. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1424 [95 Cal.Rptr.2d 57]; *Van de Kamp v. Bank of Am.* (1988) 204 Cal.App.3d 819, 869 [251 Cal.Rptr. 530].)

By avoiding party status, objectors also avoid the consequences of frivolous appeals. These consequences include the risks of delay to class members while the appeal is pending. That delay can limit or thwart class recovery altogether. The defendant could become insolvent. The class member might pass away or become unable to locate due to the passage of time. Objectors also shirk any responsibility for the substantial cost to the courts and class counsel that result from frivolous appeals.

Requiring an objector to be a party means she would have to take on some of the risks that class representatives must bear. She would be subject to discovery, could be liable for costs awarded, and potentially liable for attorney fees. Here, Class Counsel have spent more than two years and more than $100,000.00 in costs and fees fighting Petitioner's appeal, even

though she has no standing under Code of Civil Procedure section 902. There is no pathway to recover any compensation for this substantial work. Forcing these costs on courts and Class Counsel (who are the only attorneys willing to take on fiduciary duties to the Class in this case) is not only unfair; it discourages attorneys from bringing class actions altogether.

Petitioner expressly disclaims any fiduciary obligation to the Class here, arguing she can hold up classwide relief solely for her own interests. (Petitioner's Brief, at p. 41 ["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."].) But an unnamed class member should not, merely by virtue of being in the class, have a right to appeal that is not tethered to any fiduciary duty to the class. Allowing a class member to appeal without intervention gives that class member the power to override the persons who have a fiduciary duty to the class (the trial court, the class representative, and class counsel), and delay, or worse derail, relief to the class, with no requirement or even consideration as to whether that class member is acting for the class or out of self-interest. It also imposes no costs or consequences for frivolous appeals.

2. The Substantial Benefits of Intervention Outweigh any Minimal Burden

Code of Civil Procedure section 387 governs intervention in a civil action. It provides for permissive intervention by a person with an interest in the litigation. It provides for mandatory intervention where there is 1) a statutory right to intervene; or 2) where "the person seeking intervention claims an interest relating to the property or 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." (Code Civ. Proc., § 387.)

A person can seek to intervene by *ex parte* application (*Adoption of Lenn E.* (1986) 182 Cal.App.3d 210, 217 [227 Cal.Rptr. 63]), noticed motion (*City of San Francisco v. State of Cal.* (2005) 128 Cal.App.4th 1030, 1033 [27 Cal.Rptr.3d 722]), or by oral motion. (*Simac Design v. Alciati* (1979) 92 Cal.App.3d 146, 157 [154 Cal.Rptr.676].) An unnamed class member could easily meet the first prong of the mandatory intervention standard because she "claims an interest relating to the property or transaction which is the subject of the action." (Code Civ. Proc. § 387.) The unnamed class member would also have to demonstrate that her interest is not "adequately represented by existing parties." (*Ibid.*) Requiring an unnamed class member to articulate the grounds for intervention in the trial court results in a more complete record below, a key benefit to intervention.

Once a trial court grants permission to intervene, the intervenor must file a complaint to become a party to the action. (*Klinghoffer v. Barasch* (1970) 4 Cal.App.3d 258, 261 [84 Cal.Rptr.350].) After filing the complaint in intervention, the intervenor has the same rights as an original party. (*Montgomery v. Bio-Med Specialties, Inc.* (1986) 183 Cal.App.3d 1292, 1296 [228 Cal.Rptr. 709] [an intervenor "becomes a party to the action, with all of the same procedural rights and remedies of the original parties"].) Again, requiring an unnamed class member to articulate her claims in a complaint in intervention, for example outlining the specific objections to a settlement, results in a more complete record below.

Eggert's intervention requirement imposes, at most, a minimal burden on objecting class members. In Petitioner's case, she could have requested orally to intervene at any time, or through noticed motion or *ex parte* application. The trial court would have had a record of the grounds for Petitioner's request under Code of Civil Procedure section 387, including the basis for any claim that the class representatives were not adequately representing Petitioner's interests. The negligible inconvenience of moving to intervene is minor compared to the far greater burden to the appellate court and class counsel of an appeal, particularly where the record below has not been fully developed. In that case, the burden falls not only on the court and class counsel, but also sharply on class members, whose share of a settlement or class verdict is put at risk given the delays of appeal.

The intervention requirement does not limit in any way a class member's important right to appear and object in the trial court. Often, these objections take the form of informal notes or letters, or oral comments at the hearing. The trial court, in its fiduciary role, must consider these objections in reviewing a class settlement or attorney fee award. (*Kullar, supra,* 168 Cal.App.4th at p. 129.) An order denying intervention is appealable. (*Klinghoffer, supra,* 4 Cal.App.3d at p. 258.)

This case exemplifies the benefits of *Eggert's* bright-line rule requiring intervention. Here, Petitioner claims the right to appeal the trial court's order without accepting any of the attendant fiduciary duties or responsibilities of a class representative. Petitioner made no attempt to make a clear record below of her objections. Petitioner did not even file a written objection before the hearing. Her appeal is based on a "Request for Clarification" and a vague oral objection at the hearing. Even though Class

Counsel served Petitioner with a detailed lodestar analysis, Petitioner did not even bother to look at the analysis prior to the hearing on the motion for attorney fees. If Petitioner were truly interested in the best interests of the class, she would have sought to intervene and been willing to take on the responsibilities of a class representative. She did not. She has no standing to appeal.

3. Allowing Unnamed Class Members to Appeal Without Intervening Threatens the Manageability of Class Actions

Allowing an unnamed class member to appeal without intervening transforms a class action from a case commenced and litigated by a representative party in the trial court, to a case litigated by as many of the unnamed class members who choose to appeal in the appellate court. That is antithetical to the goals of fairness and efficiency that the class action device seeks to fulfill.

In *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069 [56 Cal.Rptr.3d 861, 155 P.3d 268], this Court held that a trial court should not consider the merits of a case brought as a class action until after it has ruled on the issue of class certification. (*Id.* at p. 1074.) The issue at hand was "one-way intervention," a problem created when "not-yet-bound absent plaintiffs may elect to stay in a class after favorable merits rulings but opt out after unfavorable ones." (*Ibid.*) One-way intervention allows class members to stand on the sidelines and "wait and see" what happens on the merits before deciding whether to join the class. This Court found that would be unfair to a defendant, who would be "open to being pecked to death by ducks. One plaintiff could sue and lose and another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success." (*Id.* at p. 1078.) This Court's solution to the problem of one-way intervention was to require unnamed class

members to make a choice at the certification stage, before any determination on the merits: stay in the class, or opt out. (*Id.* at p. 1079.) "Thereafter they are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse." (*Ibid.*)

Allowing an unnamed class member to appeal without intervening flies in the face of this principle. Here, the Petitioner received notice of the pending class action and had the opportunity to opt out. Petitioner chose not to, with the knowledge that by failing to opt out, she would be bound by any judgment rendered in this case. Petitioner remained on the sidelines throughout the litigation, even though her counsel was informed of the proceedings at every stage. The case proceeded to trial. The trial court adjudicated the merits of the class' claims, and entered judgment for the class, awarding $30.00 per violation. After scrutinizing Class Counsel's motion for an award of attorney fees, the trial court awarded the requested amount.

Petitioner is now asking for "one-way" appellate rights. She wants to be "unbound" by that judgment, and free to appeal even though she has not moved to intervene and is not willing to accept the responsibilities of appearing as a party in the action. Under *Fireside*, Petitioner should not be allowed to sit on the sidelines and wait to see if she really wants to be bound until after a determination on the merits. Petitioner cannot have it both ways. She should either move to intervene if she believes the class is not adequately represented, or accept the judgment as a silent beneficiary of the work of class counsel and the class representatives. In either case, Petitioner was free to voice any concerns about the claims process to the

trial court, and the trial court was obligated to (and did) consider those concerns before entering judgment. But Petitioner should not be allowed to tie up this case, or burden the appellate court, by appealing without intervening.

The same is true where a class action is resolved by settlement. (Cal. Rules of Court, rule 3.769(f).) California Rules of Court, rule 3.769 (f) requires notice of a pending settlement to unnamed class members. Before notice is distributed, the trial court must preliminarily approve the settlement as fair, adequate, and reasonable to the class. (Cal. Rules of Court, rule 3.769(c).) California law requires fair and adequate representation, not representation or results that are to the precise liking of every member of the class. If an unnamed class member does not believe the settlement is in her best interest, she can opt out. If an unnamed class member does not believe the settlement is in the class' best interest, or that the class is not adequately represented, she can move to intervene and act on behalf of the class.

Another way to consider the problems inherent in allowing appeals by unnamed class members without intervention is to view it from a different procedural lens. If the trial court here had found that Restoration Hardware was not liable, then under Petitioner's standards, any unnamed class member would be able to appeal that decision, even though every one of those class members had received notice and an opportunity to opt out but chose to stay in the class and be bound by any judgment. That would defeat the entire purpose of *Fireside* to avoid one-way intervention by making class members determine at the certification stage, before the merits had been decided, whether or not they would stay in the class.

4. The Res Judicata Exception to Party Status Under Code of Civil Procedure section 902 Should Not Apply in Class Actions.

Petitioner invokes a res judicata "exception" to the party requirement in Code of Civil Procedure section 902 discussed in *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289 [50 Cal.Rptr.2d 493], to argue that any unnamed class member should be able to appeal a class judgment merely because the class member would be bound by the judgment. But following Petitioner's argument, the exception would swallow the rule in class actions, defeating the representative nature of class actions that is the hallmark of fairness and efficiency.

In *Marsh*, the appellant was an expert witness challenging a trial court order setting his hourly rate for deposition testimony. (*Marsh, supra,* 43 Cal.App.4th at p. 293.) In analyzing whether the expert witness had standing, the appellate court noted that there is an exception to the "party of record" requirement in Code of Civil Procedure section 902 "where a judgment or order has a res judicata effect on a nonparty." (*Id.* at p. 296.) The court found standing, however, because Code of Civil Procedure section 2034, subdivision (i), contemplated that an expert witness would have standing to appeal an order setting an expert witness fee. (*Ibid.*) "The procedure for fee determination and the possible sanctions against the expert witness appear to make the expert witness a 'party' to the motion although not a party to the underlying action. We conclude that the expert witness, as a party to the motion, has standing to appeal the order resulting from the motion." (*Id.* at pp. 296-97.)

The circumstances of an unnamed class member like Petitioner are materially different. Petitioner received a notice of pendency of class action pursuant to California Rules of Court, rule 3.766. That notice advised Petitioner that she could do nothing, remain in the Class, and be bound by any judgment; or she could opt out and pursue her own claims. Petitioner chose the first option and remained in the Class. Unlike the expert witness in *Marsh*, Petitioner was represented throughout the litigation by class representatives and class counsel with fiduciary duties to represent the best interests of the class, and the litigation was overseen by a trial court with a similar fiduciary duty to the class.

It would defeat the entire purpose of class actions to allow Petitioner to appeal a judgment as an unnamed class member, when she agreed to be bound. Petitioner traded her individual claim for the efficiency of the class action procedure, which allowed her to sit on the sidelines while the class representatives and Class Counsel did all the work and took all the risk. Petitioner should not be entitled to a "do over" at the end of the litigation because she prefers a different result.

Petitioner would be in a different position if she had never received notice of the class action. (*Cf. Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 843 [199 Cal.Rptr. 134].) In *Simons*, the appellate court found that a member of a defendant class had standing to appeal a settlement of claims against the defendant class, where there were serious questions as to whether the defendant class ever received notice of the pending action. (*Id.* at p. 842.) The *Simons* court did not create a general exception to standing, but instead based its decision on the "circumstances of the 'representative'

defendants' settlement of respondents' claims against them." (*Ibid.*) The court allowed the appeal on equitable grounds. (*Ibid.*) There is no inequity here in holding Petitioner to her decision to stay in the Class after receiving notice.

Petitioner argues that her right to opt out had no value because she did not know how the case would be resolved at the time she had to make that decision. (Petitioner's Opening Brief, at p. 42.) But that is precisely the point of *Fireside* and the class action procedure. Petitioner was not forced to be a member of the Class. Petitioner chose to be a member of the Class and forgo her individual rights of suit when she did not opt out after receiving notice and an opportunity to do so. The benefits of class actions are thwarted by one-way appeals.

C. Federal Authority Is Not Binding on This Court

Petitioner criticizes the appellate court for referencing federal circuit cases that pre-date the U.S. Supreme Court's decision in *Devlin v. Scardeletti* (2002) 526 U.S. 1 [119 S.Ct. 966, 143 L.Ed.2d 1], arguing that *Devlin* stands for the proposition that an unnamed class member does not have to move for intervention in order to be considered a "party" for purposes of appeal. But *Devlin* is not binding on this Court. The appellate court did not commit any error by considering the policies articulated in federal court decisions pre-dating *Devlin*.

In *Devlin*, an unnamed class member moved to intervene to challenge a class action settlement, filed an objection, and appeared at the fairness hearing. (*Devlin, supra,* 526 U.S. at p. 5.) The trial court denied the

motion to intervene as untimely, but still considered the objections to the settlement. (*Ibid.*) The trial court approved the settlement, and the class member appealed. (*Ibid.*) The appellate court affirmed the denial of intervention and held that because the class member was not a named plaintiff, he did not have standing to appeal the settlement. (*Ibid.*)

The Supreme Court stated that this was not a question of standing under Article III of the U.S. Constitution. (*Devlin, supra,* 526 U.S. at p. 6.) The Court treated that as a separate inquiry, finding that the class member had a sufficient interest in the settlement to create a case or controversy that satisfied constitutional standing requirements. (*Ibid.*) The issue before the Court was whether the class member should be considered a "party" for purposes of appeal under the Federal Rules of Appellate Procedure. (*Id.* at p. 7.)

The Court held that the unnamed class member could appeal even though his motion to intervene was denied, because "[t]o hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court." (*Devlin, supra,* 526 U.S. at p. 10.) But that is not the case here, where Petitioner had the opportunity to opt out of the Class, but chose not to, knowing that she would be bound by any judgment.

Indeed, the *Devlin* court noted that the class at issue was certified under Federal Rule of Civil Procedure 23(b)(1), which does not allow class members to opt out. (*Devlin, supra,* 526 U.S. at p. 10.) In that situation, "the approval of the settlement is petitioner's only means of protecting

himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate." (*Id.* at p. 11.) This case is notably different.

Following *Devlin*, courts have questioned its application to cases where class members have the right to opt out. (*See, e.g., AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 261 F.3d 1305, 1310 (11th Cir. 2004) ["This feature of *Devlin* has led at least one court to believe that it applies only to mandatory class actions."]; *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir. 2002) ["Because the Court relied upon the mandatory character of the class action, we question whether *Devlin's* holding applies to opt-out class actions certified under Rule 23(b)(3)."]). Other courts have declined to apply *Devlin* to state class action procedures. In *Ballard v. Advance Am.* (2002) 349 Ark. 545, 549 [79 S.W.3d 835], the Arkansas Supreme Court rejected *Devlin* and held that intervention is a prerequisite for appeal in Arkansas courts:

> *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. ... In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.
>
> ***
>
> [T]his court's opinion in *Haberman v. Lisle*, 318 Ark. 177 ... continues to be the controlling precedent in Arkansas. In *Haberman*, this court found that for unnamed class members to have standing to appeal a class-action settlement in state

> court, those class members must have intervened at the trial court level. Non-parties and unnamed members of the class who have failed to intervene are precluded from appealing a class settlement.

(*Id.* at 549).

Devlin addressed an issue regarding federal procedural rules that does not bind this Court or overrule *Eggert*. This Court should reaffirm *Eggert*, which provides a bright-line rule requiring intervention that promotes certainty, fair representation for the class, and development of a complete record in the trial court.

D. *Trotsky* and its Progeny Should Be Disregarded

Petitioner relies heavily on *Trotsky v. Los Angeles Federal Savings & Loan Assn.* (1975) 48 Cal.App.3d 134 [121 Cal.Rptr. 637], to argue that this Court should overturn *Eggert*. The appellate court properly disregarded *Trotsky* because it conflicts with *Eggert*, and fails to even address *Eggert*. The cases that follow *Trotsky* do not address *Eggert's* requirement of intervention, or discuss any policy considerations that would support their conflict with *Eggert*. Because an appellate court in California cannot overturn a Supreme Court decision, these decisions must be disregarded. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].)

This Court is the only court with the authority to overturn *Eggert*. *Eggert* is a critical component of California law that ensures that the class action procedure will be both fair and efficient, and it should not be overturned.

ALTERNATIVELY, THE COURT SHOULD AFFIRM APPLICATION OF *EGGERT* TO CLASS ACTIONS THAT ARE DISPOSED OF ON THE MERITS AS OPPOSED TO SETTLEMENT

California Rules of Court, rule 3.769 requires that class members be notified of a settlement and given an opportunity to object at a final approval hearing. This additional procedural step makes sense in a class settlement, where the class representative has agreed to a compromise of class members' claims.

The California Rules of Court do not require any similar notice or opportunity to object to a request for attorney fees following a determination on the merits of a class' claims. Nor should they, since there is no compromise of claims. Instead, rule 3.771(b) only requires that notice of the judgment be provided to the class, without any opportunity to object.

If the Court is inclined to adopt the reasoning of *Devlin* or of *Trotsky* and allow class members to become quasi-parties when they object to a settlement or appear at a fairness hearing, that holding should be limited to class actions that are resolved by settlement. There is no need to allow appeal without intervention when, like here, the trial court has determined the merits of the class' claims. There is also no procedure, like a written objection to a class settlement, that would provide an objective basis for finding that an unnamed class member is a party under Code of Civil Procedure section 902. At a minimum, the Court should affirm *Eggert* and its application where the merits of class claims are fully adjudicated through trial.

CONCLUSION

Petitioner's final argument unnecessarily confuses the issue of constitutional standing with statutory standing to bring an appeal under Code of Civil Procedure section 902. In *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980 [103 Cal.Rptr.3d 426], the appellate court noted that California courts are not bound by the standing requirements under Article III of the U.S. Constitution like federal courts. (*Id.* at 990.) This does not mean, however, that "standing" to appeal is not also a requirement in California state courts. The requirement for standing is found in Code of Civil Procedure section 902, which requires that an appellant be both a party, and aggrieved. That is a jurisdictional requirement.

Whether described as the standing of a party or the jurisdiction of a court, the requirement remains the same: to appeal, a person must be both a party and aggrieved. Petitioner is neither. This Court should affirm the decision of the appellate court, and reaffirm the holding in *Eggert* that requires an unnamed class member to intervene in order to be considered a party under Code of Civil Procedure section 902.

Dated: December 19, 2016

Respectfully Submitted,
STONEBARGER LAW, APC
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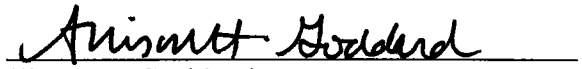

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BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 8.204 OF THE CALIFORNIA RULES OF COURT

Under Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has typeface of 13 points or more, Time New Roman type, and contains 7,165 words, as counted by Microsoft Word 2007 word processing program used to generate the brief.

Dated: December 19, 2016

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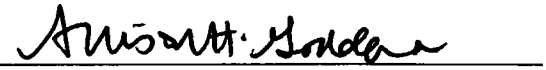

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PROOF OF SERVICE

I am a citizen of the United States and am employed in San Diego County. I am over the age of eighteen (18) years and not a party to this action; my business address is 402 West Broadway, 29th Floor, San Diego, California 92101.

On December 19, 2016, I caused to be served the below named document by placing a true copy thereof enclosed in a sealed envelope and served in the manner and/or manners described below to each of the parties herein and addressed as follows:

ANSWER TO APPELLANT FRANCESCA MULLER'S OPENING BRIEF ON THE MERITS

XX **BY OVERNIGHT MAIL - CCP §1013(c), 2015.5.** I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery with Federal Express this same day in the ordinary course of business.

See Attached Service List

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

Executed at San Diego, California on December 19, 2016.

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