No. S233983
Appellate No. D067091

IN THE SUPREME COURT OF CALIFORNIA

MIKE HERNANDEZ, *et al.*,

Plaintiffs and Respondents,

FRANCESCA MULLER,

Plaintiff and Appellant;

v.

RESTORATION HARDWARE, INC.,

Defendant and Respondent.

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

PETITION FOR REVIEW

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INTRODUCTION

Plaintiff Class Member and Appellant Francesca Muller (hereinafter "Class Member Muller") respectfully petitions this Court for review of the March 14, 2016, published opinion of the California Court of Appeal, Fourth Appellate District, Division One, *Hernandez, et al., Pls. and Resp'ts; Francesca Muller, Pl. and Appellant v. Restoration Hardware, Inc., Def. and Resp't*, No. D067091, 2016 Cal.App. LEXIS 185 (4th App. Dist., Div. 1, Mar. 14, 2016) (hereinafter "*Restoration Hardware* Op.").

A copy of the published opinion is attached as Exhibit 1.

STATEMENT OF ISSUE PRESENTED

Does 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), requiring an unnamed class member in a class action to intervene[1] in the litigation in order to obtain appellate standing, continue to be the law of this state?

> 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 at 201 (emphasis added).

The Fourth Appellate District's *Restoration Hardware* decision, dismissing an unnamed class member's appeal of an award of attorneys' fees to Class Counsel, relies on this Court's 1942 decision in *Eggert* as its principal ground.

> *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 ... we must adhere to *Eggert* and dismiss the appeal.

Restoration Hardware Op. at *14 (footnote omitted; citation omitted; emphasis added).

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[1] *Eggert,* 20 Cal.2d at 201, sets the requirement of becoming a "party to the record," which the Restoration Hardware decision has interpreted to mean "intervening" (Op. at *21-*22) to accomplish this status.

Is this Court's 1942 *Eggert* decision controlling authority for the rule that, in California, an unnamed class member in a class action can only obtain appellate standing by intervening? Or should this Court adopt the position of the otherwise nearly unanimous[2] California courts of appeal (see No. 1 below and pages 16-19, *infra*), which have recognized appellate standing for unnamed class members who do not seek to intervene but who file an objection and appear at a fairness hearing.

REASONS FOR GRANTING REVIEW

1. This Court should grant review of the *Restoration Hardware* decision in order to "secure uniformity" (California Rules of Court (CRC), Rule 8.500(b)(1)) in the appellate courts of California because there is now a split of authority. *Restoration Hardware* holds that a class member must seek intervention and move to vacate the judgment (Op. at *21-*22) in order to obtain appellate standing. This holding conflicts with the holdings of numerous other appellate districts, which have held that a class member may obtain appellate standing by filing an objection and attending the fairness hearing.

The Second Appellate District'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);

- 2005 decision in *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc.* (hereinafter *Mrs. Gooch*), 127 Cal.App.4th 387 [127 Cal.Rptr.3d 514] (2d App. Dist., Div. 7, Mar. 7, 2005).

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[2] *But see Sherman v. Allstate Ins. Co.*, 90 Cal.App.4th 121 [108 Cal.Rptr.2d 722] (2d App. Dist., Div. 7, June 25, 2001), page 20, *infra*, denying standing to a class member who did not intervene.

The First Appellate District's:

- 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).

The Sixth Appellate District's:

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

And, an earlier Fourth Appellate District's:

- 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).

There are now two contradictory rules of law in published appellate decisions concerning how unnamed class members in California class actions achieve appellate standing. Until the *Restoration Hardware* decision, the filing of an objection and attendance at a fairness hearing were sufficient. *Restoration Hardware* has changed that and created new conflicting authority. The law on standing in California's appellate courts is now unsettled. This conflict in authorities warrants this Court's attention.

This court should rule on whether its 74-year-old decision in *Eggert, supra,* relied upon by *Restoration Hardware* – requiring formal intervention – continues to be the law for unnamed class members. If *Eggert* is no longer valid, then *Restoration Hardware* should be overruled.

2. This Court should grant review of the *Restoration Hardware* decision because it is "necessary to ... settle an important question of law...." (CRC, Rule 8.500(b)(1).)

(a) Class actions have become of paramount importance in the litigation landscape. Class members in class actions throughout the state of California regularly take appeals from superior court approvals of class action settlements and/or awards of attorneys' fees to class counsel. They need to know whether formal intervention is required. The class action mechanism's approval process curtails thousands, indeed millions, of California class members' 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 may be deprived of their rights by the actions of the class plaintiff.

Trotsky, supra, 48 Cal.App.3d at 149 (emphasis added).

Unless this Court intercedes, the *Restoration Hardware* decision will now be available to any California Court of Appeal wishing to dismiss an appeal by an unnamed class member, without getting to the merits of the arguments. Because "there is no horizontal *stare decisis* in the California Court of Appeal," *Sarti v. Salt Creek Ltd.*, 167 Cal.App.4th 1187, 1193 [85 Cal.Rptr.3d 506] (4th App. Dist., Div. 3, Oct. 27, 2008), the *Restoration Hardware* decision creates a procedural uncertainty that only this Court can resolve. To leave this issue in doubt will allow other appellate districts and divisions within those districts throughout the state to follow, as they might choose, either line of contradictory cases to grant or deny appellate review on important issues of class action procedure.

> """One [court of appeal] district or division may refuse to follow a prior decision of a different district or division...."""

Sarti, supra, 167 Cal.App.4th at 1194 n.4 (citations omitted).

(b) Direction from this Court is necessary in light of the number of occasions in which class action appellate decisions address standing issues in unpublished as well as published opinions. For example:

- *Mostajo v. Anchor General Ins. Co.*, No. G033640, 2005 Cal.App.Unpub. LEXIS 2525 (4th App. Dist., Div. 3, Mar. 22, 2005).
- *Williams v. Bre Property Investors, et al.*, No. A111414, 2006 Cal.App. Unpub. LEXIS 6850 (1st App. Dist., Div. 1, Aug. 7, 2006).
- *Santiago v. Kia Motors America, Inc.*, No. G036985, 2007 Cal. App. Unpub. LEXIS 4792 (June 15, 2007).
- *Bronk v. Talarico*, No. B1854000, 2007 Cal.App.Unpub. LEXIS 1540 (2d App. Dist., Div. 3, Feb. 28, 2007).
- *Yip v. Zia, et al.*, No. B188228, 2007 Cal. App. Unpub. LEXIS 3243 (2d App. Dist., Div. 3, Apr. 24, 2007).
- *Grinberg v. Maria's Holding Corp.*, No. B244535, 2013 Cal.App. Unpub. LEXIS 8324 (2d App. Dist., Div. 4, Nov. 18, 2013).
- *Alonzo v. First Transit, Inc.,* No. B253699, 2015 Cal.App. Unpub. LEXIS 7415 (2d App. Dist., Div. 7, Oct. 15, 2015).

The aforementioned cases are cited not as authority on any legal issue, but only as an indication that the standing issue is important and needs resolution by this Court. While these unpublished[3] decisions were predominately consistent with *Trotsky, supra,* one case, *Santiago v. Kia Motors*, in dismissing an unnamed class member's appeal, relied on *Eggert*:

> A Supreme Court decision requiring dismissal of an appeal by non-parties to a class action, *Eggert v.*

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[3] See accompanying Appellant's Motion for Judicial Notice in Support of Petition for Review and supporting documents.

> *Pac. States S. & L. Co. (1942) 20 Cal.2d 199* (*Eggert*), applies a fortiori to this case.
> ....
> To the degree, of course, that the rule relied on by the *Mrs. Gooch* court might arguably be read to contradict *Eggert*, the latter [*Eggert*] case controls.

Santiago, supra, 2007 Cal. App. Unpub. LEXIS 4792 at *6 and *11, respectively.

(c) Another unsettled area of law that this Court could clarify concerns the very designation of this problem as one of standing (*Restoration Hardware* Op. at *21-*22). This 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* raises an argument that appears relevant to appellate standing as well.

> 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).

On the federal side, *Devlin v. Scardelletti,* 536 U.S. 1 (June 10, 2002), also indicates that standing is not the appropriate concept of legal analysis regarding the right of unnamed class members in class actions 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.

3. This Court should grant review because the *Restoration Hardware* decision's reliance on this Court's decision in *Eggert* involves an important issue of public policy regarding the appellate rights of unnamed class members in class actions. Each year millions, if not tens of millions, of Californians are involuntarily brought into class action litigation as unnamed class members. Their rights are adjudicated without their active participation and appeal is the only mechanism that allows them to obtain judicial review of trial court decisions affecting their rights.

The burdens placed on unnamed class members by *Restoration Hardware* in order to obtain appellate standing is a public concern that warrants this Court's attention. Consumers brought into class action litigation without their permission should not have the burden of being obligated to file complaints in intervention and motions to vacate to protect their rights. Equally important, these burdens are unnecessary and superfluous to the extent that 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.

(California Code of Civil Procedure, section 387(b) (emphasis added).)

The *Restoration Hardware's* requirements of motions to intervene and motions to vacate the judgment make unnecessary work for objectors, class counsel, defense

counsel, the trial court judge, and appellate courts. They also dissuade unnamed class members from seeking appellate review when their rights are violated.

4. This Court should grant review because there is a potential that this issue will not be raised in this Court in the foreseeable future.

Class Member Muller respectfully requests that this Court grant review of the *Restoration Hardware* decision because the issue of unnamed class members' ability to obtain appellate standing merits this Court's review now. *Eggert, supra*, is a 74-year-old, two-page decision bereft of discussion of legal principles or policy arguments.

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).

5. This Court should grant review because the judiciary has a special responsibility to ensure the proper functioning of the class action mechanism.

The class action is a judicial creation. California courts have a special role ("'The courts are supposed to be the guardians of the class.'" *Kullar v. Foot Locker Retail, Inc., et al.*[4]) in ensuring that the rights of unnamed class members in the appellate process are protected. This Court should at least reconsider *Eggert* in light of more current federal practice, noting that "a sea-change (sic) in the nature of class actions" has occurred (*In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d

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[4] 168 Cal.App.4th 116, 129 [85 Cal.Rptr.3d 20] (1st App. Dist. Oct. 14, 2008) (citations omitted).

283, 323 (3d Cir. July 23, 1998)), which this Court has suggested can provide guidance to California courts. There is now confusion and uncertainty about the procedures required for unnamed class members to protect their appellate rights.

The responsibility of the judiciary to ensure the proper functioning of the class action mechanism extends to appellate courts as well.

> 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).[5]

STATEMENT OF THE CASE

The detailed facts of this case are available in the "Factual and Procedural Background" contained in the *Restoration Hardware* opinion (see Exhibit 1, p. 2). This Statement of the Case will highlight the issues specifically relevant to this appeal, as well as note the inaccuracies in the court of appeal's statement of "Factual and Procedural Background."

Michael Hernandez filed this class action in the San Diego Superior Court in 2008, alleging that Defendant Restoration Hardware violated Civil Code § 1747.08 of the Song-Beverly Credit Card Act of 1971 by requesting and recording zip codes from consumers who used a credit card for purchasing items in Defendant's California retail stores.

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[5] "[I]n the absence of controlling state authority, California courts should utilize the procedures of *[R]ule 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).

On June 19, 2013, Plaintiff Class Member Muller filed a "Notice of Appearance of Additional Counsel" in the litigation (Appellant's Appendix ("AA") at 3):

> The undersigned counsel hereby appears as additional counsel on behalf of Plaintiff Class Member Francesca Muller in the above-captioned class action.

in response to a "Notice of Pendency of Class Action" she received (AA 1, 2).

> 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. It also advised that, if they elected to remain in the class, they had the option of entering an appearance through counsel.

Restoration Hardware Op. at *3 (emphasis added).

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* Op. at *3.

The issues regarding the class's damage claims were decided at a bench trial in January 2014. By virtue of the court's decision on the merits, a common fund of $36,412,350 was created. After the trial court's decision on the merits and the establishment of a settlement fund, Class Counsel directly negotiated a settlement of their fee with the Defendant.

> After meeting and conferring at arms-length (sic) 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., Respondents' Appendix to Opposition Brief ("RA"), at 122:12-14.)

Plaintiffs' counsel filed a "Notice of Motion and Motion for: 1) Award of Attorneys' Fees, etc." (RA 87), setting September 5, 2014, as the date for the hearing

on the motion. Class Counsel requested a common fund attorneys' fee award of 25% of the class's recovery, or $9,103,087.50, as a reasonable attorneys' fee.

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

On September 2, 2014, Plaintiff Class Member Muller filed a "Request for Clarification and to Appear Telephonically at the September 5, 2014, Hearing" (AA 5), on Class Counsel's motion.

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 Op. at *8.

The trial court approved the negotiated attorneys' fee as requested and filed its Final Judgment on September 29, 2014. (AA 14.)

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

On March 14, 2016, the Court of Appeal for the Fourth Appellate District issued its published opinion (Exhibit 1 attached), dismissing Class Member Muller's appeal on the ground of lack of standing (without reaching the merits of her claim).

Errors in the Court of Appeal's "Factual and Procedural Background"

1. Three statements in the *Restoration Hardware* Opinion's "Factual and Procedural Background" (Exh. 1, p. 2) regarding events in the trial court are not supported by the record.

(a) The first incorrect factual finding was the appellate court's conclusion that *Restoration Hardware* was on "all fours" with *Eggert* (see page 2, *supra*, commencing with the quote "*Eggert* appears to be on 'all fours' with the present action...." *Restoration Hardware* Op. at *14).

In making this finding, the appellate court ignores a crucial distinction in Class Member Muller's appeal regarding notice. In the *Eggert* case, notice was provided to 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).

Ironically, on the issue of notice, *Restoration Hardware*, although relying on *Eggert*, ignores its factual dissimilarities. Unlike *Eggert*, it was only after the court approved the fee for Class Counsel (AA 14) that the parties sent a "Notice of Judgment in Class Action" (AA 25) to class members, advising class members of the terms of the court's decision on damages due the plaintiff class. However, even that notice made no mention of the amount of the attorneys' fee that the trial court had awarded to Class Counsel.

(b) The second incorrect factual finding by the appellate court stated:

> [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* Op. at *21 n.6 (emphasis added).)

This is simply not correct. 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, p. 15, *supra*) – a negotiation to which unnamed class members were not privy. Furthermore, the fee was not determined by the trial court as part of an adversarial proceeding as the parties had entered into a settlement of the issue.

(c) The appellate court's third incorrect factual finding was:

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

Restoration Hardware Op. at *8 (emphasis added).

Class Member Muller challenged the lodestar cross-check calculation by the trial court, and in doing so argued by implication that the purported check on the percentage used by the court allowed for 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....

(Reporter's Appeal Tr., 9/5/14, Vol. 1, at 23:3-17; emphasis added.)

LEGAL DISCUSSION

I.

THE *RESTORATION HARDWARE* COURT'S RELIANCE ON *EGGERT,* A 74-YEAR-OLD TWO-PAGE DECISION, SHOULD BE REVISITED

A. *Restoration Hardware's* Reliance on *Eggert* Should Be Reconsidered.

> [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.

> [W]e begin with our analysis of whether Muller may prosecute this appeal.
> ....
> [B]ecause we conclude the separate "party" element is absent here.
> ....
> Muller does not have standing to appeal the judgment....

Restoration Hardware Op. at *8, *13, *2, respectively.

Indeed, in shepardizing *Eggert,* only one published[6] authority, *Sherman v. Allstate Ins. Co.*, 90 Cal.App.4th 121 [108 Cal.Rptr.2d 722] (2d App. Dist., Div. 7, June 25, 2001) (see page 20, *infra*), other than *Restoration Hardware* has ever relied on *Eggert*[7] to support a holding that an unnamed class member in a class action needs to intervene in order to obtain appellate standing.

> See *County of Alameda v. Carleson (1971) 5 Cal.3d 730, 736-737 [97 Cal. Rptr. 385, 488 P.2d 953]* [only an aggrieved party has standing to appeal]; *Eggert v. Pac. States S. & L. Co. (1942) 20 Cal.2d 199, 200-201 [124 P.2d 815]*....

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[6] And one unpublished opinion, see *Santiago, supra,* 2007 Cal.App. Unpub. LEXIS 4792.

[7] The *Mrs. Gooch* court (127 Cal.App.4th at 396, *supra*) was aware of *Eggert* and cited it, but only on the issue of aggrieved parties. It did not consider *Eggert's* "party to the record" criterion applicable.

Mrs. Gooch, supra, 127 Cal.App.4th at 396.

II.

THE *RESTORATION HARDWARE* DECISION, REQUIRING INTERVENTION BY UNNAMED CLASS MEMBERS TO OBTAIN APPELLATE STANDING, CONFLICTS WITH NUMEROUS CALIFORNIA APPELLATE DISTRICT DECISIONS

A. The Filing of an Objection and Appearance at a Fairness Hearing Is 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, supra,* which held:

> 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.

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

The *Restoration Hardware* court found that *Trotsky* incorrectly based its analysis on federal class action procedures, and also that federal procedure was in dispute.

> 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...." (*Eggert, supra,* 20 Cal.2d at p. 201.)
> ....
> *Trotsky's* analysis is also flawed because it relied primarily on federal cases....
> ....
> 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 Op. at *17-18 (citation omitted), *18, and *20, respectively.

However, *Trotsky's* holding is consistent with current United States Supreme Court jurisprudence. See pages 22 through 25, *infra*.

2. The Second Appellate District's decision in *Mrs. Gooch, supra,* contradicts the *Restoration Hardware* Decision.

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).

3. The Sixth Appellate District's decision in *Wershba, supra,* contradicts the *Restoration Hardware* Decision:

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.

Restoration Hardware held, contradicting *Wershba*:

> [W]e conclude *Trotsky's* analysis of standing is flawed and that *Trotsky* .... should not be followed.

Restoration Hardware Op. at *18 (citations omitted).

The *Restoration Hardware* court ruled that *Wershba, supra,* and *Mrs. Gooch, supra,* both relied upon a purportedly flawed 1975 decision in *Trotsky,*

which *Restoration Hardware* asserts failed to consider *Eggert* and was based on a misinterpretation of federal law.

> 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.*....

Restoration Hardware Op. at *15-*16 (citations omitted).

The *Restoration Hardware* decision contradicts the First Appellate District's 1990 decision in *Rebney, supra,* which held:

> [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).

4. The First Appellate District, Division One's decision in *Chavez, supra,* contradicts the *Restoration Hardware* opinion:

> 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).

The *Restoration Hardware* court ignored:

(a) *Chavez*:

The *Restoration Hardware* decision contradicts the First Appellate District's 2008 decision in *Chavez, supra,* which held:

> 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);

(b) *Simons*:

The *Restoration Hardware* decision contradicts the First Appellate District's 1984 decision in *Simons, supra,* which held:

> 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); and,

(c) *Roos v. Honeywell International, Inc.*:

The *Restoration Hardware* decision contradicts the First Appellate District's 2015 decision in *Roos, supra,* 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.

Roos, 241 Cal.App.4th at 1483-84 (emphasis added).

5. The Fourth Appellate District, Division Three's decision in *Consumer Defense Group, supra*, contradicts the Fourth Appellate District, Division One's 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.

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

The *Restoration Hardware* decision surprisingly does not mention *Consumer Defense Group.* However, because that case did not consider *Eggert* and is based on federal authorities, it would presumably be categorized along with and suffer that same analysis as *Wershba, Trotsky, and Mrs. Gooch.*

6. Except for *Restoration Hardware*, the only other published decision that requires intervention by unnamed class members is the Second Appellate District's decision in *Sherman v. Allstate*, *supra,* which relies in part on *Eggert*:

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

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

III.

THE *RESTORATION HARDWARE* COURT'S RELIANCE ON *MARSH* IS MISPLACED

A. *Restoration Hardware* Cites to *Marsh v. Mountain Zephyr, Inc.*, but Fails to Acknowledge the Significance of the Word "Generally" in the *Marsh* Court's Holding.

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 v. Mountain Zephyr, Inc., 43 Cal.App.4th 289, 295, 295 [50 Cal.Rptr.2d 493] (4th App. Dist., Div. 1, Mar. 6, 1996) (emphasis added).

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

> [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* Op. at *13 n.4 and *10 (emphasis added)),

without considering the exceptions to the general rule that *Marsh* specifically identified.

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

Restoration Hardware repeats the "generally" qualification to the rule, but fails to address the exception identified in *Marsh*, namely that because unnamed class members are "bound by the judgment" (*Restoration Hardware* Op. at *3), they need not become "parties to the record" in order to have the right to appeal.

> 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, supra, 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).

IV.

THE *RESTORATION HARDWARE* COURT'S LEGAL ANALYSIS OF FEDERAL LAW, WHICH IT USES TO REJECT *TROTSKY'S* REASONING, IS SIMPLY WRONG

A. There Is No Federal Authority Contrary to the Proposition Argued by Class Member Muller That Intervention Is Not Required under Federal Law.

1. The *Restoration Hardware* court is wrong in its review of federal authorities. It holds that the *Mrs. Gooch* and *Wershba* decisions rely on *Trotsky* and should not be followed because *Trotsky* had wrongly interpreted federal jurisprudence. See page 16, *supra*, of this Petition, commencing with the quote "Thus, because *Trotsky* relies on federal authority...." *Restoration Hardware* Op. at *20.

The *Restoration Hardware* decision incorrectly interprets the United States Supreme Court's decision in *Marino v. Ortiz*, 484 U.S. 301 (1988), to support its assertion that there is no consistent federal rule on the question of an intervention requirement for unnamed class members in class actions to obtain appellate standing:

> 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 Op. at *20 n.6 (emphasis added).

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 misunderstanding of *Marino*.

> [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....

Marino, supra, 484 U.S. at 304.

United States Supreme Court rulings on unnamed class members' right to appellate standing are not in conflict. *Restoration Hardware* misses a crucial distinction between non-named class members (as noted in *Devlin*) and non-named parties (persons not members of the class (as noted in *Marino*). The *Devlin* decision clearly identifies this distinction. As *Devlin* specifically points out, *Marino* is not in conflict because *Marino* did not involve an issue of an unnamed class member, but rather persons who were outside of the class.

> 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).

4. It should also be noted that *Restoration Hardware* cites no post-*Devlin* legal commentary that raises the issue of a lack of uniformity at the federal level on the issue of appellate standing for unnamed class members.

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

1. The 1992 and 1998 federal authorities relied on by the *Restoration Hardware* decision, *Felzen v. Andreas, et al.*, 134 F.3d 873 (7th Cir. Jan. 21, 1998),

and *Croyden Associates v. Alleco, Inc., et al.*, 969 F.2d 675 (8th Cir. July 13, 1992), have been superseded[8] by the 2002 *Devlin* decision as it pertains to unnamed class members' appellate rights.

Restoration Hardware cites *Felzen*:

> [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....

(*Restoration Hardware* Op. at *18 and *19, respectively),

and *Croyden Associates*:

> 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"....

(*Restoration Hardware* Op. at *18; citations omitted),

in support of its holding, but fails to appreciate that both have been overruled by the United States Supreme Court in *Devlin, supra.*

2. *Powers v. Eichen*, 229 F.3d 1249 (9th Cir. Oct. 20, 2000).

The *Restoration Hardware* court's reliance on *Powers* reflects a misunderstanding of the proceedings in the superior court as discussed on pages 13-14, *supra.*

> Moreover, whatever merit *Powers's* rationale might have in the context of a proposed *settlement* of a class action ... the amount of the attorney fees awarded 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....

---

[8] "The phenomenon of reliance on subsequently overruled authority is [not unique]." *Rodriguez v. Bethlehem Steel Corp., et al.*, 12 Cal.3d 382, 391-92 [115 Cal.Rptr. 765] (Aug. 21, 1974).

Restoration Hardware Op. at *21 n.6.

In the first place, the amount of the attorneys' fee was part of a negotiation process between Class Counsel and Defendants, and unnamed class members were not privy to that process. Secondly, the fee award was not made by the trial court as a result of an adversary proceeding between the parties. (See pages 13-14, *supra*, regarding errors in the "Factual and Procedural Background" of the *Restoration Hardware* Opinion.)

Finally, the *Restoration Hardware* decision misapplies the *Powers* decision – which concerned appeals of attorneys' fee awards – by asserting "whatever merit Powers' rationale might have in the context of a proposed *settlement* of a class action..." (*Restoration Hardware* Op. at *21; emphasis in original.)

V.

NUMEROUS UNPUBLISHED DECISIONS ADDRESS UNNAMED CLASS MEMBERS' APPELLATE STANDING ISSUES, WARRANTING CLARIFICATION BY THIS COURT

A. The Standing Issue Is an Important Procedural Issue, Frequently Addressed by California Appellate Courts.

> In class actions, an unnamed class member ordinarily lacks standing to challenge the judgment in a class action. (See *Eggert v. Pac. States S. & L. Co.* ....) However, "[i]n the context of a class settlement, objecting is the procedural equivalent of intervening." (*Wershba v. Apple Computer, Inc.* ....)

Grinberg v. Maria's Holding Corp., supra, 2013 Cal.App. Unpub. LEXIS 8324 at *16, *relying on Eggert*, 20 Cal.2d at 200-01, and *citing Wershba*, 91 Cal.App.4th at 253.

> Furthermore, there is no question that as a member of the class, Bronk ... was aggrieved.... [S]he has standing to appeal....

Bronk v. Talarico, supra, 2007 Cal.App.Unpub. LEXIS 1540 at *16 n.4 (citation omitted).

> ([S]ee *Devlin v. Scardelletti* ... [an unnamed class member who objected to a settlement in a class action is a party for purposes of appeal].)

Yip v. Zia, supra, 2007 Cal. App. Unpub. LEXIS 3243 at *37-*38, *relying on Devlin*, 536 U.S. at 6-11.

> A nonparty may have standing to appeal, however, where "a judgment or order has a res judicata effect on the nonparty."

Alonzo v. First Transit, Inc., supra, 2015 Cal.App. Unpub. LEXIS 7415, at *11 (citation omitted).

> " ... 'A person who would be bound by the doctrine of res judicata, whether or not a party of record, is . . . [entitled] to appeal.'..."

Mostajo v. Anchor General Ins. Co., supra, 2005 Cal.App.Unpub. LEXIS 2525 at *11, *citing Marsh, supra,* 43 Cal.App.4th at 295 (internal citation omitted).

> In any event, unnamed class members who have not appeared in the proceeding, and are not aggrieved by the trial court's decision, lack standing to appeal. (*Code Civ. Proc., § 902*; see *Eggert v. Pac. States S. & L. Co. (1942) 20 Cal.2d 199, 201....*)
> ....
> [C]onsidered parties to it for purposes of res judicata....

Williams v. Bre Property Investors, et al., supra, 2006 Cal.App. Unpub. LEXIS 6850, at *8, *9 (citations omitted).

VI.

THE *RESTORATION HARDWARE* DECISION IS CONTRARY TO PUBLIC POLICY

The *Restoration Hardware* court references the public policy benefits of intervention; however, the federal courts, in examining the benefits and detriments of an intervention requirement, have come to the opposite conclusion. Equally important, an overwhelming number of appellate courts in this state have come to this same conclusion as the federal courts (see pages 15-20, *supra*). Intervention not only places

unwarranted procedural obstacles upon unnamed class members, but creates unnecessary costs and burdens on class counsel, defendants, and the courts as well.

A. Unnamed Class Members May Intervene in Class Actions As of Right.

According to *Restoration Hardware*, an unnamed class member must file a complaint in intervention and a motion to vacate the judgment (Op. *22-*23), and, if denied, appeal the denial of the intervention motion. This is all an unnecessary expenditure of the parties' time and judicial resources. Code of Civil Procedure section 387(b) recognizes the right of individuals that have been affected by a judgment to intervene as of right.

> If any provision of law confers an unconditional right to intervene or if 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.

California Code of Civil Procedure, § 387(b) (emphasis added).

Because an unnamed class member who has objected to a settlement and/or fee approval will, by definition, be affected by the judgment, and, as an objector cannot be represented by the existing parties who favor approval of the settlement to which the class member objects, intervention is of right. There is no point in requiring such unnamed class member/objector to go through the motions (no pun intended) of a process whose outcome is mandated by law.

B. The *Restoration Hardware* Decision's Public Policy Arguments Cannot Withstand Scrutiny.

The *Restoration Hardware* decision makes the unsupported assertion that intervention furthers the objectives of the class action mechanism:

> 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* Op. at *22.)

The decision offers no showing that appeals by unnamed class members have imposed any kind of burden on the courts, or in any way interfered with "orderliness, efficiency, or fairness to other class members" (Op. at *22). All its references are to hypothetical burdens (Op. at *21 n.6). At the same time, the *Restoration Hardware* Decision imposes significant burdens on potential appellants and creates its own inefficiencies on everyone involved in the litigation.

It should be clear that the costs imposed by the intervention/motion to vacate procedures on an unnamed class member, as well as class counsel, defendants, and the courts, in time and expense are hardly minimal. However, it is the benefits conferred that are actually minimal. For example:

> [I]ntervention would put the class defendant on notice of a possible appeal from the judgment.

(*Restoration Hardware* at *22.) The decision offers no explanation of why this benefit is significant.

> Intervention would have the effect of giving Muller a clear avenue from which to challenge the attorney fee award, because as a party Muller could not be ignored by the court, the class plaintiffs, or the class defendant....

Restoration Hardware Op. at *22. This purported benefit ignores the fact that filing an objection and appearing at a fairness hearing could provide the same opportunity.

> [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* Op. at *21.) 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 (AA2), advising class members of their right to exclude themselves from the litigation, occurred well before the January 2014 bench trial took place. The opt-out procedure is not a protection for class members because it occurs in advance of any rulings on the settlement and attorneys' fees.

Restoration Hardware also fails to appreciate that an unnamed class member who objects to a class action settlement or attorneys' fee award need not (and does not) represent the class in order to file a valid objection and pursue it on appeal.

> 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 *18-*19 (emphasis added).

C. *Powers v. Eichen* Offers Public Policy Benefits Superior to That of *Restoration Hardware.*

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

> *Powers* ignored that permitting unnamed class members to appeal a judgment without seeking to intervene would create the *same* delays and burdens....

Restoration Hardware Op. at *20-*21. This is not true. Complaints in intervention – and subsequent motions to set aside the judgment – create 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 would be in addition to the burdens and delays of an appeal.

Powers addresses the public policy justifications for its rejection of the requirement of intervention:

> Assuring fair and adequate fee awards outweighs the danger that allowing appeals by non-intervening unnamed parties will complicate the settlement process.
> ....
> "Assuring fair and adequate settlements outweighs concerns that non-intervening objectors will render the representative litigation 'unwieldy.'"

Powers, supra, 229 F.3d at 1256 and 1255 (citation omitted), respectively.

CONCLUSION

The *Restoration Hardware* decision has created disagreement and confusion among the courts of appeal of this state regarding how an unnamed class member in a class action may obtain appellate standing. That fact, in addition to the other reasons raised in this Petition, makes a review of an issue that this Court has not addressed in 74 years necessary at the present time.

Class Member Muller respectfully requests that the California Supreme Court grant this Petition for Review.

Dated: April 21, 2016.

Respectfully submitted,

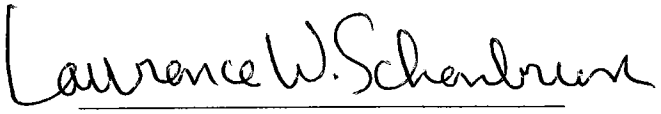
Lawrence W. Schonbrun

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

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the attached Petition for Review contains 7,983 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: April 21, 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 April 21, 2016, I caused to be served a copy of the following document:

PETITION FOR REVIEW

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

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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 April 21, 2016, at Berkeley, California.

Sandra Norris

Sandra Norris

Hernandez, et al., Pls. and Resp'ts; Francesca Muller,
Pl. and Appellant v. Restoration Hardware, Inc., Def. and Resp't
No. D067091, 2016 Cal.App. LEXIS 185
(4th App. Dist., Div. 1, Mar. 14, 2016)

EXHIBIT 1

2 of 13 DOCUMENTS

MIKE HERNANDEZ et al., Plaintiffs and Respondents; FRANCESCA MULLER, Plaintiff and Appellant, v. RESTORATION HARDWARE, INC., Defendant and Respondent.

D067091

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

2016 Cal. App. LEXIS 185

March 14, 2016, Opinion Filed

PRIOR HISTORY: [*1] APPEAL from a judgment of the Superior Court of San Diego County, No. 37-2008-00094395-CU-BT-CTL, William S. Dato, Judge.

DISPOSITION: Appeal dismissed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court made a postjudgment award of attorney fees in a consumer class action that had been litigated to judgment. (Superior Court of San Diego County, No. 37-2008-00094395-CU-BT-CTL, William S. Dato, Judge.)

The Court of Appeal dismissed an attempted appeal by an absent class member who had appeared through counsel to object to the award. The court held that the absent class member lacked standing to appeal (Code Civ. Proc., § 902), even if aggrieved, because the absent class member was not a party of record and had taken no steps to be added as a named plaintiff, despite having ample opportunity to do so. The court observed that California Supreme Court precedent was controlling, that federal authority was inconsistent, and that a bright-line rule requiring party status to appeal a class action was appropriate because the cost of intervention was minimal and the benefits to both the parties and the court system were substantial. (Opinion by McDonald, J., with Huffman, Acting P. J., and Nares, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Appellate Review § 7--Parties--Aggrieved and of Record.--Only a party aggrieved may appeal from a judgment (Code Civ. Proc., § 902). As a general rule, only parties of record may appeal, and the courts have interpreted § 902 to require the appellant both to have been a party below and to have been aggrieved by the judgment.

(2) Parties § 6--Class Actions--Absent Members.--A class action is one prosecuted by named representative plaintiffs, who have a fiduciary responsibility to prosecute the action on behalf of the absent parties. The class action structure relieves the unnamed class members of the burden of participating in the action, hiring counsel, and incurring costs. Indeed, the 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. Although unnamed class members may be deemed parties for the limited purposes of discovery, unnamed class members are not otherwise considered parties to the litigation.

(3) Appellate Review § 7--Parties--Class Actions--Absent Members--Standing to Appeal.--California Supreme Court precedent appeared 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;

Exhibit 1-1

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, it was necessary to adhere to this precedent and dismiss the appeal.

[Cal. Forms of Pleading and Practice (2015) ch. 40, Appeal: An Overview, § 40.13.]

(4) Appellate Review § 7--Parties--Class Actions--Absent Members--Standing to Appeal.--Unnamed class members whose only appearance was to object to the attorney fees have no standing to appeal because they are not parties and did not avail themselves of the ample opportunity to become parties of record. The party requirement of Code Civ. Proc., § 902, is not met merely because the "aggrieved" requirement of § 902 might also be satisfied as to a nonparty class member.

(5) Appellate Review § 7--Parties--Class Actions--Absent Members--Standing to Appeal.--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. Even if they remain, California law provides that a person who is a nonparty may acquire appellate standing by intervening and moving to vacate the judgment (Code Civ. Proc., § 378). They may then appeal the order denying the motion to vacate. A bright-line rule requiring party status to appeal a class action is appropriate where the cost of intervention is minimal and benefits, to both the parties and to the court system, are substantial.

COUNSEL: Law Office of Lawrence W. Schonbrun and Lawrence W. Schonbrun for Plaintiff and Appellant.

Patterson Law Group, James R. Patterson, Allison H. Goddard; Stonebarger Law and Gene J. Stonebarger for Plaintiffs and Respondents.

No appearance for Defendant and Respondent.

JUDGES: Opinion by McDonald, J., with Huffman, Acting P. J., and Nares, J., concurring.

OPINION BY: McDonald, J.

OPINION

McDONALD, J.--In this class action, the class representatives alleged defendant Restoration Hardware, Inc. (RHI), committed numerous violations of *Civil Code section 1747.08*, part of the Song-Beverly Credit Card Act of 1971 (*Id.*, § 1747 et seq.). After a bench trial, the trial court found RHI was liable for as many as 1,213,745 violations of that statute and set a penalty recovery in the amount of $30 per violation, subject to RHI's right to dispute any specific claim. Under that judgment, RHI faced a total maximum liability of $36,412,350.

In posttrial proceedings, class representatives requested the court order an award of attorney fees of $9,103,087.50 (25 percent of the total maximum fund of $36,412,350 created by the judgment) to be payable to [*2] class counsel from the fund. RHI agreed it would not contest that request. Francesca Muller, a class member and the person prosecuting the present appeal, requested the court order notice of the attorney fee motion be sent to all class members. The court denied Muller's request, granted the attorney fee motion, and entered judgment in the action. Muller then filed a notice of appeal from the judgment.

Muller asserts the court erred when it declined to order that notice be given to all class members of the hearing on the attorney fee award, and that the award was calculated in violation of applicable standards and procedures. Muller also claims the court's award was an abuse of its discretion. Class representative Mike Hernandez asserts Muller does not have standing to appeal the judgment and that the appeal should therefore be dismissed. Hernandez alternatively argues (1) no notice to the class of the attorney fee hearing was mandated and (2) the amount awarded as fees, as well as the procedure employed by the trial court for determining the amount of the attorney fee award, was proper.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Class Action*

Michael Hernandez filed this action in 2008 alleging [*3] defendant RHI violated *Civil Code section 1747.08* by requesting and recording ZIP codes from consumers who used a credit card in purchase transactions in RHI's California retail stores. After years of litigation, the court ultimately certified the case as a class action, appointed Michael Hernandez and Amanda Georgino as class representatives (together Hernandez), and appointed Patterson Law Group and Stonebarger Law as counsel for the class.

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. It also advised that, if they elected to remain

in the class, they had the option of entering an appearance through counsel. Two weeks later, Attorney Schonbrun entered an appearance in the action on behalf of Muller. However, 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.

B. *The Verdict and Common Fund Award*

After a bench trial, the court issued its decision in favor [*4] of the class. The court found RHI committed "as many as" 1,213,745 violations of *section 1747.08, subdivision (a)(2)*, for credit card transactions that occurred during the class period because RHI requested, obtained and recorded the customer's ZIP code as part of the credit card transaction.[1] The court also concluded the appropriate penalty under *section 1747.08, subdivision (e)*, for each violation would be $30, for a total recovery by the class of up to $36,412,350.

> 1 However, the court's decision specified the maximum number of violations was "subject to reduction" if information obtained during the claims process provided RHI with evidence to show that a particular credit card transaction did *not* result in a violation of *section 1747.08, subdivision (a)(2)*, because RHI *inaccurately* recorded the customer's ZIP code. The court accepted class counsel's suggestion that RHI could be given the opportunity to challenge an individual class member's claim during the claims process if RHI could show the ZIP code *recorded* by RHI for the particular customer did not match the customer's *actual* ZIP code. The court ordered the parties to meet and confer "on the scope and particulars of an appropriate claims process, including a means for RHI to challenge the accuracy of any recorded ZIP codes."

Because [*5] the court's decision ordered the parties to meet and confer regarding an appropriate claims process, the parties met and agreed on a claims process, and a process for distributing the total award (the claims procedures). The parties' stipulation proposed the final judgment award of $36,412,350 be "treated as a common fund inclusive of any attorneys' fees, costs, and class representative enhancements" subsequently ordered by the court, and also include administrative costs associated with administering the claims process. The parties proposed that, after deduction of attorney fees, costs, and class representative enhancements, the net remaining fund (the Net Fund) would be distributed to class members as (1) a prorated share of the Net Fund up to $30 per violation cash payment to persons submitting valid claims and who elected cash payments, and (2) the "coupon option" to persons submitting valid claims (if they did not elect the cash award) for 33 percent off of an up to $10,000 purchase of nonexcluded RHI merchandise valid for one year from issuance of the coupon. The parties' proposal also contained a provision that, at the end of the coupon period, if the payouts from the Net Fund in [*6] cash or from coupon savings did not exhaust the Net Fund, an additional coupon would be issued with a dollar cap sufficient to exhaust the Net Fund.

C. *The Attorney Fees Determination*

Hernandez subsequently moved for an attorney fee award seeking an award of attorney fees equivalent to 25 percent of the total judgment recovered for the class.[2] The court, although acknowledging a percentage award might ultimately be the appropriate method to calculate the fee award, also directed class counsel to supplement the motion for fees with a filing that employed a traditional "lodestar" calculation. Hernandez subsequently submitted the lodestar calculation and analysis, which showed class counsel had spent over 3,500 hours, totaling nearly $2.7 million in costs advanced and fees incurred, and detailed the attorneys involved, the tasks performed, and the reasonableness of the hourly rates for those attorneys. Hernandez's submission also articulated the reasons that supported application of a "multiplier" to the lodestar calculation.

> 2 Class counsel declared RHI agreed not to oppose a court award of the requested amount as long as class counsel sought the minimum 25 percent amount and, absent that [*7] stipulation, class counsel would have requested a higher amount. Analogous "clear sailing" stipulations have been determined to be appropriate by other courts. (See, e.g., *Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 552-556 [96 Cal. Rptr. 3d 127]*.)

Muller, who was served with the attorney fee motions, did not file any objection contesting the propriety of the amount sought by Hernandez as attorney fees. Instead, Muller filed an August 29, 2014, "Request for Clarification," asking for clarification on whether class members would receive notice of the fee application and the right to appear and comment on the application.[3] Prior to the hearing on the attorney fees, the court issued its tentative ruling determining (1) a percentage award in a "common fund" case was permitted by California law, (2) a 25 percent fee was a percentage courts use as a "starting benchmark," and (3) a fee at or above that benchmark was "particularly appropriate" considering the risks undertaken, and results obtained, by counsel in this action.

Exhibit 1-3

3 Muller also sought clarification of whether class counsel would be required to file "lodestar information." However, the court had already ordered class counsel to file lodestar information and, on August 29, 2014, Hernandez did file and serve [*8] the required lodestar information.

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 ... [because] [class] counsel and defendants negotiated a settlement on the question of attorneys' fees." Muller also argued, for the first time at the hearing, that a court must use the "lodestar multiplier approach" (rather than a percentage of the fund approach) when calculating the fee award, but did not argue the *amount* the court's tentative ruling proposed to award was excessive.

D. *The Judgment*

The court's final judgment, which apparently tracked the parties' proposed claims procedures process, provided for awarding $36,412,350, to be "treated as a common fund inclusive of any attorneys' fees, costs, and class representative incentive enhancements ordered by the Court and any administrative costs associated with administering the claims process ... ." The court awarded attorney fees of $9,103,087.50, [*9] or 25 percent of the total maximum fund of $36,412,350 created by the judgment, as well as litigation costs and class representative incentive enhancements, and directed the remainder of the fund (less administrative costs of administering the claims process) be distributed as specified by the judgment. Muller filed her notice of appeal within the time specified by law.

II

ANALYSIS

Muller raises numerous claims of alleged error in the judgment entered below. First, she claims the court could not adjudicate the attorney fee motion without first giving notice to the class of Hernandez's motion to set the appropriate attorney fee award, and giving all class members an opportunity to object to the motion, and the failure to do so in this case violated both due process protections and California's class action procedures. Second, Muller argues the court, by calculating the award based on a percentage of the common fund rather than by a properly rigorous lodestar multiplier approach, transgressed controlling California precedent. Finally, Muller argues class counsel breached its fiduciary duty to the class by "negotiating" with RHI over the amount of fees to be paid by the common fund.

Hernandez [*10] contests each of Muller's claims of error. However, Hernandez raises a jurisdictional challenge to this court's ability to entertain the appeal, arguing that because Muller was neither a "party" nor "aggrieved" by the judgment, she does not have standing to pursue this appeal and the appeal must therefore be dismissed. Because this claim is jurisdictional (*Life v. County of Los Angeles (1990) 218 Cal.App.3d 1287, 1292, fn. 3 [267 Cal. Rptr. 557]* ["standing to appeal is jurisdictional"]; *In re Marriage of Tushinsky (1988) 203 Cal.App.3d 136, 141-143 [249 Cal. Rptr. 611]*), we begin with our analysis of whether Muller may prosecute this appeal.

A. *General Principles*

(1) Only a "party aggrieved may appeal" from a judgment. (*Code Civ. Proc., § 902.*) As a general rule, only parties of record may appeal (*County of Alameda v. Carleson (1971) 5 Cal.3d 730, 736 [97 Cal. Rptr. 385, 488 P.2d 953]*), and the courts have interpreted *section 902* to require the appellant *both* to have been a "party" below and to have been "aggrieved" by the judgment. (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"].)

(2) A class action is one prosecuted by named representative plaintiffs, who have a fiduciary responsibility to prosecute the action on behalf of the absent parties. (*Earley v. Superior Court (2000) 79 Cal.App.4th 1420, 1434 [95 Cal. Rptr. 2d 57].*) The class action structure relieves the unnamed class members of the burden of participating in the action, hiring counsel, and incurring [*11] costs. (*Ibid.*) 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.'" (*Ibid.*, fn. omitted.) Although unnamed class members may be deemed "parties" for the limited purposes of discovery (*Southern California Edison Co. v. Superior Court (1972) 7 Cal.3d 832, 840 [103 Cal. Rptr. 709, 500 P.2d 621]*), unnamed class members are not otherwise considered "parties" to the litigation (cf. *National Solar Equipment Owners' Assn. v. Grumman Corp. (1991) 235 Cal.App.3d 1273, 1282 [1 Cal. Rptr. 2d 325]* ["unnamed class members do not 'stand on the same footing as named parties ...'"]).

B. *Analysis*

Hernandez argues that, because Muller is not a party, the appeal should be dismissed under *Eggert v. Pac. States S. & L. Co. (1942) 20 Cal.2d 199 [124 P.2d 815]* (*Eggert*).[4] In *Eggert*, the court addressed whether an unnamed class member could appeal from a judgment entered in the class action. There, the named plaintiff (Eggert) commenced an action against the savings and loan company on behalf of himself and some 1,500 persons who were certificate holders. The court held the suit a proper class action, and in its judgment for Eggert and the other certificate holders whom he represented decreed that they recover from the defendant over $1.8 million to be apportioned pro rata among them after [*12] deduction of expenses and fees, and reserved jurisdiction to determine the fees to be paid to the plaintiff's attorneys. After appointing a receiver to facilitate the collection and payment of the judgment, the court also issued an order, directed to the plaintiff and all other persons interested, to show cause why it should not make an order fixing reasonable attorney fees. Two certificate holders appeared and objected to the amount ordered as attorney fees for the plaintiff's attorneys, and subsequently appealed from the order rejecting their objections. (*Eggert, supra, 20 Cal.2d at pp. 199-200.*) The class representative moved to dismiss the appeal, and our Supreme Court granted the motion to dismiss the appeal, explaining "it is a settled rule of practice in this state that only a party to the record can appeal. [Citations.] Appellants were not named as parties to the action nor did they take any appropriate steps to become parties to the record. The fact that their names and the extent of their interest in the action appeared in an exhibit attached to the complaint and the judgment did not make them parties ... . [Citations.] Although their attorney appeared at the hearing on the petition for the payment of the money to plaintiff's [*13] 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. [Citation.] 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. They could then have appealed from the order denying the motion." (*Eggert, at p. 201.*) Accordingly, the Supreme Court ordered the appeal dismissed. (*Ibid.*)

> 4 Hernandez also argues the appeal should be dismissed because Muller was not "aggrieved" by any of the purported errors committed below, and the parties vigorously contest whether the "aggrieved" element is satisfied here. It is unnecessary to address the "aggrieved" element of appellate standing, and we do not examine the bulk of the cases relied on by Muller addressing that issue, because 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"]; *In re Miguel E. (2004) 120 Cal.App.4th 521, 538-544 [15 Cal. Rptr. 3d 530]* [although grandparents were aggrieved by order, grandparents' appeal was dismissed because they were not parties to action]; *Rose v. Rose (1952) 110 Cal.App.2d 812, 813 [243 P.2d 578]* [child appealed from order denying [*14] mother's application for increased child support for child; court ordered appeal dismissed because, although child's beneficial interest in such increase was harmed by order, child "was not named as a party to the action, did not take any appropriate steps to become a party to the record, and since the court did not order her brought into the action, she has no right to appeal from the order"].)

(3) *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.[5] 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.

> 5 On appeal, Muller asserts Hernandez has "ignore[d] the legal ramifications" of entering an appearance and of objecting to the attorney fee award and "never ... provide[d] legal authority ... for a proposition that [such actions are] insufficient to confer appellate standing." [*15] However, we believe *Eggert does* explain the legal effect such actions have on appellate standing, and is fatal to Muller's contrary argument.

Muller argues we may disregard *Eggert* and entertain this appeal, but we are unpersuaded by her arguments. Muller argues, for example, that *Eggert* was decided before the 1966 revisions to rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.) and those federal rules are persuasive in modern California class action jurisprudence (see, e.g., *Arias v. Superior Court (2009) 46 Cal.4th 969, 989 [95 Cal. Rptr. 3d 588, 209 P.3d 923]* (conc. opn. of Werdegar, J.)), and because *Eggert* predated those rule changes it is no longer relevant to the issue of appellate standing. However, Muller cites no authority suggesting that changes to *federal* procedural rules for managing class actions at trial undermine the analysis of a *state* statute that limits the standing of par-

ties entitled to appeal, and we are aware of no relevant authority that does so.

Muller also cites several cases in which California appellate courts stated a class member who was not a party to the action obtains appellate standing to challenge the judgment merely by interposing an objection to the judgment below. However, neither of the cases cited by Muller, *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal.App.4th 387 [25 Cal. Rptr. 3d 514]* and *Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224 [110 Cal. Rptr. 2d 145]*, made any effort to reconcile their conclusions with *Eggert*, and instead [*16] rooted their conclusions in the analysis contained in *Trotsky v. Los Angeles Fed. Sav. & Loan Assn. (1975) 48 Cal.App.3d 134 [121 Cal. Rptr. 637]* (*Trotsky*). (See *Wershba, at pp. 235-236* [citing only *Trotsky* on issue of standing]; *Consumer Cause, at pp. 395-396* [citing *Trotsky* and *Wershba* on issue of standing].) Accordingly, we examine *Trotsky*.

In *Trotsky*, the appellants were unnamed members of the affected class who appeared at a settlement hearing and objected to a proposed settlement of a class action lawsuit. *Trotsky*, discussing the standing to appeal issue, stated: "[A]ppellant is a party aggrieved, and has standing to appeal. (*Code Civ. Proc., § 902.*) This is true even though appellant could instead have 'opted out,' i.e., requested exclusion from the judgment. [Citation.] As stated by the court in *Ace Heating & Plumbing [Co.] v. Crane [Co.] (3d Cir. 1971) 453 F.2d 30, 33*, deciding a similar question under rule 23 of the Federal rules of Civil Procedure, '... It is possible that, within a class, a group of small claimants might be unfavorably treated by the terms of a proposed settlement. For them, the option to join is in reality no option at all. 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 [*17] unfair settlement. We conclude that appellants have standing to appeal ... .' [Citations.] Were the rule otherwise, a class member who objected in the trial court to the terms of the settlement would be unable to secure appellate review of the court's order approving the settlement." (*Trotsky, supra, 48 Cal.App.3d at pp. 139-140*, fn. omitted.)

(4) Thus, *Trotsky* focused primarily on whether an objector to a settlement was "*aggrieved*" within the meaning of *Code of Civil Procedure section 902*, concluding objectors were aggrieved because "'[i]t is possible that, within a class, a group of small claimants might be unfavorably treated by the terms of a proposed settlement. For them, the option to join is in reality no option at all,'" and reasoning that because those claimants might be forced to choose between "equally unpalatable alternatives"--of accepting either nothing or an unfair settlement--those parties were sufficiently aggrieved for purposes of the right to appeal. (*Trotsky, supra, 48 Cal.App.3d at pp. 139-140.*) However, *Trotsky* did not examine the distinct "party" element of *Code of Civil Procedure section 902*, nor make any effort to reconcile its conclusion with *Eggert*'s holding that unnamed class members whose only appearance was to object to the attorney fees had no standing to appeal because they were not "parties" and did not avail themselves of [*18] the "ample opportunity ... to become parties of record ... ." (*Eggert, supra, 20 Cal.2d at p. 201.*) 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 (which includes both *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc., supra, 127 Cal.App.4th 387* and *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th 224*) should not be followed.

Trotsky's analysis is also flawed because it relied primarily on federal cases, including *Ace Heating & Plumbing Co. v. Crane Co., supra, 453 F.2d 30*, 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. (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"; holding nonparty class member lacks standing to appeal]; see also *Felzen v. Andreas (7th Cir. 1998) 134 F.3d 873* [class members must intervene as parties in order to appeal from adverse decisions]; *Walker v. Mesquite (5th Cir. 1988) 858 F.2d 1071* [nonparty class member lacks standing to appeal].)[6] The rationale, as explained by the *Croyden* court, is threefold. First, unnamed class members cannot represent the class absent the procedures outlined in rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.) because the trial [*19] court has not conducted hearings to determine whether the appellants would satisfactorily represent the interests of the other class members. (*Croyden Associates v. Alleco, Inc., supra, 969 F.2d at p. 678.*) Second, *Croyden* observed that unnamed class members who disagree with the class action have other adequate procedures through which their interests can be protected, pointing out that class members may move to intervene and, if their motion to intervene is denied, they may appeal that decision. *Croyden* observed that merely objecting to the settlement did not confer standing to appeal; rather, the unnamed class member must still move to intervene. (*Croyden, at*

pp. 678-679; accord, *Felzen v. Andreas, supra, 134 F.3d 873* [class members must intervene as parties in order to appeal from adverse decisions].) Alternatively, a dissatisfied class member may opt out. (*Croyden, at p. 678.*) Finally, *Croyden* pointed out that class actions would become unmanageable and unproductive if each class member could individually appeal. (*Ibid.*) The purpose of class actions is to "render manageable litigation involving numerous class members who otherwise would all have access to the court through individual lawsuits" (*ibid.*) and it would defeat the purpose of instituting the litigation as a class action in the first place if any and all [*20] class members could appeal from rulings and judgments (*ibid.*). Thus, because *Trotsky* relies on federal authority that has been at least undermined by contrary federal authority, and disregarded *Eggert*'s contrary (and controlling) approach, we conclude the cases on which Muller relies should not be followed.

> 6 We acknowledge the federal decisions, even from the United States Supreme Court (compare *Marino v. Ortiz (1988) 484 U.S. 301 [98 L. Ed. 2d 629, 108 S. Ct. 586]* [nonparty class members who did not seek to intervene may not appeal approval of settlement] with *Devlin v. Scardelletti (2002) 536 U.S. 1 [153 L. Ed. 2d 27, 122 S. Ct. 2005]* [reaching opposite conclusion without disapproving *Marino*]), are not uniform. 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.*) 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 (28 U.S.C.) 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 [*21] *same* delays and burdens, because 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. Moreover, whatever merit *Powers's* rationale might have in the context of a proposed *settlement* of a class action, the present action involved a court judgment in which the amount of the recovery and 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.*)

(5) Even were we free to disregard *Eggert*, which we are not (*Auto Equity Sales, Inc. v. Superior Court, supra, 57 Cal.2d 450*), adhering 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. (*Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal.App.3d 1006, 1010 [117 Cal. Rptr. 485].*) Even if they remain, California law provides that a person who is a nonparty may acquire appellate standing by intervening [*22] and moving to vacate the judgment. (*Code Civ. Proc., § 378*; *Marsh, supra, 43 Cal.App.4th at p. 295.*) They may then appeal the order denying the motion to vacate. (*Eggert, supra, 20 Cal.2d at p. 201.*) Based on these rationales, Muller's argument--that merely filing a notice of appearance (and subsequently objecting to the attorney fee award) conferred standing on her to appeal from the court's judgment--must fail. 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. Similarly, we do not see how intervention would fail to address the "unpalatable alternatives" that animated the *Trotsky* court. Intervention would have the effect of giving Muller a clear avenue from which to challenge the attorney fee award, because as a party Muller could not be ignored by the court, the class plaintiffs, or the class defendant; furthermore, intervention would put the class defendant on notice of a possible appeal from the judgment. 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. [*23]

DISPOSITION

The appeal is dismissed. Class representatives shall recover costs on appeal.

Huffman, Acting P. J., and Nares, J., concurred.

Exhibit 1-7