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No. B249253

IN THE SUPREME COURT CALIFORNIA

David Brennan, *Plaintiff Class Member/Objector and Appellant.*

MARK LAFFITTE, on behalf of himself and on behalf of others similarly situated,

Class Plaintiffs and Respondents,

vs.

ROBERT HALF INTERNATIONAL INC., ROBERT HALF OF CALIFORNIA, INC., ROBERT HALF INCORPORATED and ROBERT HALF CORPORATION dba RHC,

Defendants and Respondents.

ANSWER TO PETITION FOR REVIEW
(Class Plaintiffs and Respondents)

After a Decision by the Court of Appeal, Second District, Division 7,
Case No. B249253

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INTRODUCTION

For more than 10 years, experienced class counsel vigorously litigated this complex wage and hour class action against a formidable, experienced and well-financed adversary. Class counsel worked more than 4,000 hours (**excluding appellate proceedings which have significantly increased the hours**) pursuing claims on behalf of the Class Plaintiffs – with no guarantee that counsel would ever receive compensation for their efforts. Class Plaintiffs and their employer ultimately agreed to a ***$19 million settlement*** which, by any standard of measurement, was an outstanding result for the Class Plaintiffs.

The trial court granted class counsel's request for attorneys' fees equal to 33.33% of the gross settlement amount, concluding that the fee request was fair and reasonable. In awarding fees, the trial court applied the equitable common fund theory and calculated the fees as a percentage of the recovery. The trial court also conducted a discretionary cross-check of the fee award by calculating the lodestar (the reasonable hours worked times the hourly rates charged). The cross-check confirmed that the fee award was reasonable.

After the objector appealed, the appellate court affirmed, concluding that the calculation of fees based on a percentage of the common fund – was proper and reasonable. Undeterred, the objector filed a Petition for Review, arguing that review is warranted because the appellate court's approval of a fee award pursuant to the percentage method (with a lodestar cross-check) in a common fund case contradicts the Supreme Court's decision in *Serrano v. Priest* (1977) 20 Cal.3d 25, 141 Cal.Rptr. 315, and is inconsistent with other appellate court opinions.

That interpretation of California law is simply incorrect as no California appellate court has ever held that a fee award based on a percentage of the fund is inappropriate in a true common fund case. Thus,

the appellate court's decision is wholly consistent with *Serrano* and presents no conflict with other California authorities regarding the common fund theory. For these reasons, and those set forth below, this Court should deny the Petition, finally bringing this action to an end.

STATEMENT OF THE CASE

1. The Complaint

On September 10, 2004, Plaintiff Mark Laffitte filed a putative class-action Complaint asserting various wage and hour claims against Robert Half International, Inc., Robert Half of California, Inc., Robert Half Incorporated and Robert Half Corporation dba RHC (collectively "Robert Half"). *Laffitte v. Robert Half International Inc.*, 231 Cal.App.4th 860, 180 Cal.Rptr.3d 136, 138 (Cal.App. 2 Dist., Oct. 29, 2014). On September 18, 2006 the trial court granted Laffitte's motion for class certification with respect to several causes of action. *Id.* at 139.

2. The Settlement Agreement

On June 18, 2012, Laffitte and the class representatives in two other class actions against Robert Half involving similar claims and allegations reached a settlement of the three class actions. *Id.*[1]

Thereafter, the trial court granted preliminary approval of the settlement. On November 13, 2012, the trial court approved an amended the settlement agreement which provided, in part, that: (1) Robert Half would pay a gross settlement amount of $19,000,000; and (2) class counsel would apply for attorneys' fees up to $6,333,333.33 (33.33% of the gross settlement amount) and counsel's actual litigation costs. *Id.* at 139-40. On

[1] The two other class actions were *Williamson v. Robert Half International Inc.* (Los Angeles County Superior Court Case No. BC377930) and *Apolinario v. Robert Half International Inc.* (Los Angeles County Superior Court Case No. BC455499). *See Laffitte*, 180 Cal.Rptr.3d at 139 n.1.

January 28, 2013, class member David Brennan objected arguing, in part, that the fee request was excessive. *Id.* at 140.

3. Class Counsel's Request For Attorneys' Fees

On February 28, 2013, the class representatives filed a motion requesting $6,333,333.33 in attorneys' fees (one-third of the gross settlement) pursuant to a common fund theory. *Id.* Class counsel also submitted evidence that counsel worked 4,263.5 hours on the case (and anticipated working 200 hours on the appeal) and provided hourly rates for each attorney. Based on the hourly rate and hours worked for each attorney, class counsel calculated that the total lodestar amount as $2,968,620 ($3,118,620 including the appeal). Class counsel also requested a lodestar multiplier of between 2.03 to 2.13 for a total requested attorneys' fee award of $6,333,333.33. *Id.*

4. The Trial Court's Tentative Ruling

On March 22, 2013, the trial court held a hearing and tentatively approved the settlement and fee request. The ruling stated, in part, that: (1) the percentage method of calculating attorneys' fees in a common fund case was supported by *Lealao v. Beneficial California Inc.* (2000) 82 Cal.App.4th 19, 27, 97 Cal.Rptr.2d 797; (2) the hours worked by class counsel were reasonable; and (3) the hourly rates for class counsel were justified. *Id.* at 140-41.

5. The Trial Court's Ruling

On April 10, 2013, the trial court held another hearing and overruled Mr. Brennan's objections. *Id.* at 142. The trial court also conducted cross-check on the fees awarded pursuant to the percentage of the fund method and analyzed the lodestar amount. *Id.* at 143. The trial court concluded that the hours worked and hourly rates charged were within the norm. The trial court also found sufficient information to support the multiplier. The

trial court then granted final approval of class action settlement and awarded $6,333,333.33 in attorneys' fees and $127,304.08 in costs. *Id.*

6. The Appellate Court's Ruling

On appeal, Mr. Brennan argued, *inter alia*, that the trial court erred by awarding fees pursuant to the percentage of the fund method, rather than the lodestar method. *Id.* at 147. The appellate court rejected this argument, stating: "[T]he percentage approach may be proper where, as here, there is a common fund." *Id.*

The *Laffitte* Court acknowledged that the California Supreme Court established the "primacy of the lodestar method in California" in *Serrano v. Priest* (1977) 20 Cal.3d 25, 141 Cal.Rptr. 315. *Laffitte*, 180 Cal.Rptr.3d at 147 (*quoting Lealao*, 82 Cal.App.4th at 26). Nevertheless, the *Laffitte* Court held that "[s]ubsequent judicial opinions have made it clear that a ***percentage fee award in a common fund case 'may still be done.'***" *Id.* at 148 (emphasis added) (citing cases). In reaching this conclusion, the *Laffitte* Court specifically relied on several California appellate decisions which recognized the propriety of awarding attorneys' fees based on a percentage of a common fund, including:

- *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 96 Cal.Rptr.3d 127, which held that the ultimate goal is the award of a reasonable fee "[r]egardless of whether attorney fees are determined using the lodestar method or awarded based on a 'percentage-of-the-benefit' analysis" and "irrespective of the method of calculation." *Id.* at 557-58 (quotation omitted);
- *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 75 Cal.Rptr.3d 413, which held: "It is not an abuse of discretion to choose one method over another as long as the method

chosen is applied consistently using percentage figures that accurately reflect the marketplace." *Id.* at 65-66;

- *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 25 Cal.Rptr.3d 514, which recognized that the common fund doctrine is "frequently applied in class actions when the efforts of the attorney for the named class representatives produce monetary benefits for the entire class . . . ." *Id.* at 397;
- *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 110 Cal.Rptr.2d 145, which holds: "Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." *Id.* at 254; and
- *Lealao*, which held that "fees based on a percentage of the benefits are in fact appropriate in large class actions when the benefit per class member is relatively low . . . ." *Lealao*, 82 Cal.App.4th at 63.

See Laffitte, 180 Cal.Rptr.3d at 148-49.

Based on these authorities, the *Laffitte* Court held that in common fund cases, the "percentage of fund method survives in California class action cases, and the trial court did not abuse its discretion in using it, in part, to approve the fee request in this class action." *Id.* at 149.

The *Laffitte* Court also concluded that the "trial court's use of a percentage of 33 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits." *Id.* (citing cases).

Finally, the *Laffitte* Court approved of the trial court's lodestar cross-check, stating:

> The trial court did not use the percentage of fund method exclusively to determine whether

> the amount of attorneys' fees requested was reasonable and appropriate. The trial court also performed a lodestar calculation to cross-check the reasonableness of the percentage of fund award. This was entirely proper.

Id. at 149-50.

The *Laffitte* Court also held that the trial court "did not abuse its discretion in performing a lodestar calculation based on the declarations of class counsel to cross-check the percentage of fund award." *Id.* at 151. In addition, the *Laffitte* Court held that the trial court's "use of a multiplier of 2.13 was not an abuse of discretion" as the trial court properly considered "the proper lodestar multiplier factors in determining whether to apply a multiplier, including the difficulty of the issues in this case, the skill of class counsel, the contingent nature of the case, and the preclusion of other employment." *Id.*

LEGAL DISCUSSION

1. No California Appellate Court Has Ever Directly Held That Awarding Attorneys' Fees Based On The Percentage Method Is Inappropriate In A Common Fund Case.

As is relevant here, *Laffitte* held that the trial court did not abuse its discretion in awarding fees pursuant to the percentage method in this common fund case. Mr. Brennan essentially argues that this holding contradicts Supreme Court precedent and conflicts with other California appellate court decisions. A review of the relevant authorities, however, reveals that ***no actual conflict exists***. Thus, review is not warranted.

A. *Serrano III* And The Common Fund Doctrine.

In *Serrano v. Priest* (1977) 20 Cal.3d 25, 141 Cal.Rptr. 315 ("*Serrano III*"), the plaintiffs obtained a judgment holding that: (1) California's public school financing system violated state equal protection laws; and (2) the system must be brought into constitutional compliance within six years. *Id.* at 31. Plaintiffs' counsel then sought attorneys' fees

from various state officials (in their official capacity) based on three equitable theories: (1) the common fund theory; (2) the substantial benefit theory; and (3) the private attorney general theory. *Id.* at 31-32. The trial court awarded fees pursuant to the private attorney general theory. *Id.* at 32. On appeal, Defendants argued, *inter alia*, that the award of attorneys fees was improper under any of these three theories. *Id.* at 33. Plaintiffs argued, in turn, that the trial court erred in refusing to also base its award on the common fund and substantial benefit theories. *Id.*

In Section II(a) of the opinion, this Court extensively discussed the common fund theory. *Id.* at 34-38. This Court first noted the general rule that each party pays its own attorneys' fees, absent a specific statute or agreement by the parties. *Id.* at 34 (*citing Cal. Civ. Proc. Code* § 1021). Despite this rule, the *Serrano III* Court acknowledged the well-recognized, equitable exception to the general rule whereby courts may award attorneys' fees when the litigation creates a common fund: "[T]he well-established 'common fund' principle [applies] when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys fees out of the fund." *Id.* Pursuant to the common fund theory, "one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." *Id.* at 35 (quotation omitted). This Court also noted that courts have the "the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit." *Id.* (quotation omitted).

The *Serrano III* Court further noted that the California Supreme Court first approved of the common fund theory in 1895 and that the common fund theory "has since been applied by the courts of this state in numerous cases." *Id.* The Court specifically noted that the common fund theory applies when "the activities of the party awarded fees have resulted in the preservation or recovery of a certain or ***easily calculable sum of*** money out of which sum or 'fund' the fees are to be paid." *Id.* (emphasis added). In sum, the *Serrano III* Court acknowledged the well-settled principle of awarding fees out of a common fund but merely concluded that the common fund approach was inappropriate ***in that case*** because the litigation did not create a common fund. *Serrano III*, 20 Cal.3d at 35-38.

Here, the class representatives' efforts created an easily calculable sum of money – a $19 million settlement – which benefits all class members. Thus, the *Laffitte* Court's approval of the percentage method to award attorneys' fees in this common fund cases is fully consistent with *Serrano III*.

B. The California Supreme Court Continues To Acknowledge The Common Fund Theory.

Since *Serrano III*, the California Supreme Court has repeatedly acknowledged that viability of the common fund theory as a basis for awarding attorneys' fees. *See, e.g., Trope v. Katz* (1995) 11 Cal.4th 274, 279, 45 Cal.Rptr.2d 241 (noting that the California Supreme Court has relied on its "inherent equitable authority" to develop the common fund theory of recovery); *Sam Andrews' Sons v. Agricultural Labor Relations Bd.* (1988) 47 Cal.3d 157, 172 n.10, 253 Cal.Rptr. 30 ("This court has generally recognized only three exceptions to the application of [Code of Civil Procedure] section 1021: the ***common fund***, substantial benefit, and private attorney general theories.") (emphasis added); *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 505, 198 Cal.Rptr. 551 ("[I]f the

litigation has succeeded in creating or preserving a common fund for the benefit of a number of persons, the plaintiff may be awarded attorney fees out of that fund."); *Serrano v. Unruh* ("*Serrano IV*") (1982) 32 Cal.3d 621, 627, 186 Cal.Rptr. 754 (recognizing that the common fund theory was a well-established exception to the general rule that counsel fees are not recoverable absent statute or enforceable agreement); *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 908, 160 Cal.Rptr. 124 (recognizing the common fund theory as a basis for awarding attorneys' fees and holding that the California Public Utilities Commission "possesses equitable power to award attorney fees under the common fund doctrine in quasi-judicial reparation actions."), *disapproved on another point in Kowis v. Howard* (1992) 3 Cal.4th 888, 12 Cal.Rptr.2d 728.

C. Numerous Post-*Serrano III* Appellate Court Decisions Acknowledge The Common Fund Theory.

Numerous California appellate courts have followed *Serrano III* and acknowledged the common fund theory as proper means for awarding attorneys' fees in a common fund case. Indeed, the "cases are legion which recognize and apply the 'common fund' principle in this state." *Long Beach City Employees Assn., Inc. v. City of Long Beach* (1981) 120 Cal.App.3d 950, 959, 172 Cal.Rptr. 277 (citation omitted). Consider, for example:

- *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 976, 84 Cal.Rptr.3d 532 (acknowledging the applicability of the common fund theory as a basis for an award of attorneys' fees);
- *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 878, 71 Cal.Rptr.3d 642 ("Under the common fund doctrine, reasonable attorney fees may be awarded where the litigation created a fund from

which, in equity, the successful plaintiff's attorney should be paid.");

- *Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 662, 46 Cal.Rptr.3d 206 (recognizing the common fund theory as an equitable theory and concluding that "equitable principles are appropriately applied in determining whether to award attorneys' fees" under the common fund theory);
- *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 397, 25 Cal.Rptr.3d 514 (recognizing that the common fund doctrine is "frequently applied in class actions when the efforts of the attorney for the named class representatives produce monetary benefits for the entire class . . . .");
- *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1269, 24 Cal.Rptr.3d 818 ("The common fund doctrine . . . is simply an exception to the 'American rule,' which provides that parties to a lawsuit must ordinarily pay their own attorney fees.");
- *Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 446, 123 Cal.Rptr.2d 122 (acknowledging *Serrano III* and the viability of the common fund doctrine); *Walsh v. Woods* (1986) 187 Cal.App.3d 1273, 1276, 232 Cal.Rptr. 629 (same); *Werschkull v. United California Bank* (1978) 85 Cal.App.3d 981, 1006, 149 Cal.Rptr. 829 (same); *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 86, 144 Cal.Rptr. 71 (same);
- *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 634 n.3, 71 Cal.Rptr.2d 632 (noting that the

California "Supreme Court has relied on its inherent equitable authority" to permit an award of fees pursuant to the "common fund" theory); *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1144, 70 Cal.Rptr.2d 769 (same);

- *Jacobson v. Simmons Real Estate* (1994) 23 Cal.App.4th 1285, 1292, 28 Cal.Rptr.2d 699 (recognizing the common fund exception), *disapproved on other grounds in Trope v. Katz* (1995) 11 Cal.4th 274, 292, 45 Cal.Rptr.2d 241;
- *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1422, 14 Cal.Rptr.2d 885 (approving common fund theory to support award of attorneys' fees);
- *Conservatorship of Berry* (1989) 210 Cal.App.3d 706, 718-19, 258 Cal.Rptr. 655 ("Court-created exceptions to the general rule include circumstances . . . in which the litigation for which fees are requested has created or preserved a common fund for the benefit of a number of people (the 'common fund' doctrine).").
- *Braude v. Automobile Club of Southern Cal.* (1986) 178 Cal.App.3d 994, 1005, 223 Cal.Rptr. 914 (recognizing the common fund theory as an equitable exception to the general rule that attorney fee awards must be based either on a statute or on the agreement of the parties);
- *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 92, 210 Cal.Rptr. 351 (modifying judgment to clarify that the award of attorneys' fees is based on the common fund theory);
- *Copley v. Copley* (1981) 126 Cal.App.3d 248, 293, 178 Cal.Rptr. 842 ("[T]his case clearly falls within the confines of the common fund doctrine relating to attorneys' fees."); and

- *Long Beach City Employees Assn.*,120 Cal.App.3d at 959 (approving award of attorneys' fees pursuant to common fund theory).

Moreover, California Courts generally apply the *percentage method* to award attorneys' fees where a settlement creates a common fund for the benefit of the claimants. *See In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557, 96 Cal.Rptr.3d 127 ("[A] fee award may not be justified solely as a percentage of the recovery when that award will ***not*** come from the settlement fund.") (emphasis added); *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 63, 75 Cal.Rptr.3d 413 ("[F]ees based on a percentage of the benefits are . . . appropriate in large class actions when the benefit per class member is relatively low . . . ."); *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1271, 24 Cal.Rptr.3d 818 ("[A]ttorneys' fees awarded under the common fund doctrine are based on a 'percentage-of-the-benefit' analysis . . . ."); *Lealao v. Beneficial California Inc.* (2000) 82 Cal.App.4th 19, 27, 97 Cal.Rptr.2d 797 ("Percentage fees have traditionally been allowed in . . . common fund cases.").

D. There Is No Split Of Authorities As The Cases On Which Mr. Brennan Relies Do *Not* Involve A Common Fund.

Despite the California Supreme Court's unambiguous approval of the common fund theory and despite numerous appellate courts acknowledging the viability of the common fund theory (whereby fees may be awarded pursuant to the percentage method), Mr. Brennan argues that a "conflict" exists concerning the use of the percentage method to award attorneys' fees in a common fund case. As discussed below, Mr. Brennan's argument fails for one primary reason – the authorities on which he relies as the source of the purported conflict were ***not common fund cases***. As such, they do not and cannot create a conflict regarding the use of the percentage method in a common fund case.

1. *Lealao* is ***not*** a common fund case.

The key authority on which Mr. Brennan relies is *Lealao v. Beneficial California.* In *Lealao*, however, the class action settlement ***did not create a common fund.*** As such, class counsel could not recover attorneys' fees based on a common fund theory. Thus, *Lealao* does not support Mr. Brennan's misguided contention that a conflict of authority exists concerning the use of the percentage method in a common fund case.

In *Lealao*, plaintiffs commenced a putative class action against a major lender, alleging that the lender imposed improper prepayment penalties in connection with loans secured by their home. *Lealao*, 82 Cal.App.4th at 22. After the trial court certified the matter as a class action, the parties reached a settlement agreement. *Id.* at 23. The parties disputed whether the settlement created a common fund. *Id.* at 24. Class counsel then sought attorneys' fees from the trial court under two alternative theories: (1) a common fund theory; and (2) the lodestar method of calculating fees. *Id.* In granting attorneys' fees and costs to class counsel, the trial court unequivocally held that ***no common fund had been established*** and thus awarded fees pursuant to a lodestar calculation. *Id.* at 24-25. The trial court believed that it had no discretion to award a percentage fee because the class benefits were not in the form of a common fund. *Id.* at 25.

The appellate court held, *inter alia*, that the trial court did not abuse its discretion in refusing to award class counsel a fee based purely on a common fund theory as a percentage of the class recovery. *Id.* at 39.

The *Lealao* Court acknowledged the difference between "fee shifting" cases and "fee spreading" cases. In *fee shifting* cases, the "responsibility to pay attorney fees is statutorily or otherwise transferred from the prevailing plaintiff or class to the defendant." *Id.* at 26. In such cases, "the primary method for establishing the amount of 'reasonable'

attorney fees is the lodestar method." *Id.* In *fee spreading* cases, a settlement or adjudication results in the establishment of a common fund for the benefit of the class. Because the fee awarded class counsel comes from this fund, the expense is borne by the beneficiaries. *Id.* "***Percentage fees have traditionally been allowed in such common fund cases***, although . . . the lodestar methodology may also be utilized in this context." *Id.* (emphasis added).

The *Lealao* Court then stated that in *Serrano III*, this Court established the "primacy of the lodestar method in California." *Id.* Nevertheless, the *Lealao* Court acknowledged: "Despite its primacy, ***the lodestar method is not necessarily utilized in common fund cases***." *Id.* at 27 (emphasis added).

The *Lealao* Court then analyzed California law, noting that *Serrano III*, provided California precedent "[w]ith respect to the propriety of a pure percentage fee award." *Id.* at 38. The *Lealao* Court specifically noted that, pursuant to *Serrano III*, the common fund theory was inapplicable where class counsel's efforts did not create an identifiable fund from which they seek attorneys fees. *Id.* at 39 (*citing Serrano III*, 20 Cal.3d at 37-38). Thus, the *Lealao* Court held that the trial court properly declined to apply the common fund theory because the class benefits were not in the form of a common fund. *Id.*[2]

2. *Dunk v. Ford Motor Co.* is <u>not</u> a common fund case.

Mr. Brennan's reliance on *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 56 Cal.Rptr.2d 483, as a source of a purported conflict regarding the viability of the common fund theory is also misplaced. In

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[2] The *Lealao* Court also noted: "Even if the ascertainable amount of money respondent has actually paid to satisfy valid claims were deemed a 'fund,' class counsel has never suggested that their fee should come from this source." *Lealao*, 82 Cal.App.4th at 39.

Dunk there was no common fund and no easily calculable sum of money. As such, the Court unremarkably held that the common fund theory was not an appropriate method for awarding attorneys' fees. That holding is consistent with *Serrano III* and the application of the common fund theory in cases were a common fund exists.

In *Dunk*, plaintiffs filed a putative class action against Ford Motor Company alleging that Ford defectively constructed a door on certain Mustang convertibles. *Id.* at 1799. After the trial court certified the matter as a class action, the parties reached a settlement agreement. *Id.* at 1800. The parties stipulated that Ford would: (1) provide each class member with a redeemable coupon for $400 off the price of any new Ford car or light truck purchased within one year; and (2) pay attorney fees and costs not to exceed $1.5 million. *Id.* Plaintiffs requested attorneys' fees based on a common fund theory. *Id.* at 1810. The trial court ultimately approved the settlement and awarded class counsel nearly $1 million in attorneys' fees and costs. *Id.* at 1800.

The appellate court reversed the fee award, concluding that "the common fund approach is improper in this case" because: (1) the fees were ***not paid from a common fund***; and (2) the value of any purported fund was not easily calculated. *Id.* at 1809-10. The *Dunk* Court specifically noted that "the evidence demonstrates the attorneys were not to be paid from the 'coupon fund,' but from a distinct amount not exceeding $1.5 million." *Id.* at 1809. The *Dunk* Court ultimately clarified that it reversed the fee award because there was no common fund and no easily calculable sum of money. The Court explained that the common fund theory "should only be used where the amount was a 'certain or easily calculable sum of money.'" *Id.* In *Dunk*, the ultimate settlement value to the plaintiffs (which could be as high as $26 million) could not be determined until the one-year coupon redemption period expires. Thus, the Court concluded: "This is not the

type of settlement that lends itself to the common fund approach." *Id.* at 1809 (quotation omitted).

3. *Jutkowitz v. Bourns* is *not* a common fund case.

Mr. Brennan's reliance on *Jutkowitz v. Bourns, Inc.* (1981) 118 Cal.App.3d 102, 173 Cal.Rptr. 248 ("*Jutkowitz II*"), is similarly misplaced because it was not a common fund case.

In *Jutkowitz II*, a public corporation (Bourns, Inc.) owned primarily by the Bourns family, sought to retire the 10% of outstanding public shares, consisting of 265,000 shares held by 2,300 shareholders. *Id.* at 105. Jutkowitz initiated a putative class action, seeking to enjoin Bourns, Inc. from settling a class action filed by different shareholders by paying those shareholders $17.00 per share. *Id.* at 106. The trial court issued a preliminary injunction precluding Bourns, Inc. from completing a corporate transaction that *compelled* the retirement of outstanding public shares. Nevertheless, the trial court permitted Bourns, Inc. and shareholders to agree upon a price at which the shareholders could *voluntarily* sell their shares. *Id.* at 106-07. Bourns Inc. subsequently acquired 225,000 of the outstanding public shares at $24.00 per share. Thereafter, the trial court certified *Jutkowitz II* as a class action, on behalf of the remaining 34,327 public shares. *Jutkowitz II* then settled with each share valued at $28.75 (with $26.00 allocated to share value and $2.75 allocated to all other shareholder claims). *Id.* at 107. Bourns, Inc. agreed not to oppose an award of attorneys' fees up to $90,000. *Id.* at 108.

Jutkowitz' counsel then filed a motion seeking to require Bourns, Inc. to pay an *additional* $451,000 for services provided to those shareholders who were not part of the *Jutkowitz II* class action but accepted the $24.00 per share settlement offer. The trial court rejected this claim and awarded Jutkowitz' counsel $90,000 in attorneys' fees. *Id.*

On appeal, Jutkowitz conceded that an attorneys' fees ruling in a prior proceeding – that no common fund had been generated – was "res judicata as to any claim by him for fees for legal services rendered in connection therewith." *Id.* at 106. Nevertheless, Jutkowitz' counsel argued that although the class only consisted of holders of 34,000 shares, the preliminary injunction he obtained resulted in an increased settlement offer accepted by holders of 225,000 shares. In other words, counsel demanded an increased fee because of a purported benefit received by non-class members. *Id.* at 108-09.

The appellate court rejected this argument and affirmed the $90,000 fee award. The *Jutkowitz II* Court stated: "To the extent that plaintiff's claim is grounded on the benefit he allegedly procured for the minority shareholders by raising the price from $17.00 to $24.00, it is a resort to the common fund principle which has been developed in equity." *Id.* at 109. First, the *Jutkowitz II* Court noted that ***the common fund doctrine did not*** apply because there was *no attorney-client relationship*, stating: "[P]laintiff's counsel did not enjoy an attorney-client relationship with the holders of the above mentioned 225,000 shares, either by direct contract or as a result of being part of the class he purported to represent." *Id.* Second, the *Jutkowitz II* Court expressly (and properly) distinguished those authorities that applied the common fund doctrine on the "critical point" that in those cases a common "fund was created from which the attorney fees could be paid." *Id.* at 110. In other words, the *Jutkowitz II* Court recognized that the common fund doctrine did not apply because there was ***no common fund*** in *Jutkowitz II*. In short, the *Jutkowitz II* Court did not categorically reject the common fund theory. Rather, it held that the common fund theory could not provide a basis for awarding attorneys' fees in that case because: (1) there was no attorney-client relationship; and (2) no common fund was created by the litigation.

4. *Yuki* and *Salton Bay* are *not* common fund cases.

Finally, Mr. Brennan's citation of and reliance on *People ex rel. Dep't of Transp. v. Yuki* ("*Yuki*") (1995) 31 Cal.App.4th 1754, 37 Cal.Rptr.2d 616 and *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 218 Cal.Rptr. 839, is also unfounded. Neither *Yuki* nor *Salton Bay* involved class action litigation and neither involved the consideration or application of the percentage method in a common fund case.

In *Yuki*, for example, the trial court awarded ***statutory*** attorneys' fees to the Yuki family in an eminent domain action. *Yuki*, 31 Cal.App.4th at 1759. The Court of Appeal reversed the fee award on the ground that it contained an improper surcharge. *Id.* at 1768-69. That holding is utterly irrelevant to any issue pertaining to the continued viability of the equitable common fund theory in class actions.

Similarly, in *Salton Bay*, the trial court awarded ***statutory*** attorneys' fees in an inverse condemnation action based upon a contingency fee agreement. *Salton Bay*, 172 Cal.App.3d at 950-51. On appeal, the court rejected the argument that the court was required to determine the reasonableness of the fee only by looking at the actual fee arrangement between the client. *Id.* at 957. Instead, the *Salton Bay* Court held that the trial court should determine a reasonable fee by considering the time spent, a reasonable hourly rate and other factors (such as the contingent nature of the case, its complexity and the extent the case prevented the attorney from working on other matters). *Id.* at 957-58.

Neither *Yuki* nor *Salton Bay* was a class action. Moreover, in both cases the court considered a *statutory* fee award and did not consider the award of attorneys' fees pursuant to equitable principles. Finally, neither *Yuki* nor *Salton Bay* involved the creation of a common fund, much less an award of fees based on a common fund theory. Accordingly, neither *Yuki*

nor *Salton Bay* have any bearing on the central question raised by Mr. Brennan's Petition – whether a conflict exists among California authorities regarding the use of the percentage method in common fund cases.[3]

E. *Laffitte* Is Wholly Consistent With *Serrano III*.

Mr. Brennan argues that the *Laffitte* opinion has "repudiated" *Serrano III*. (Petition at 4). Mr. Brennan's argument is based on a statement in *Serrano III* that the "starting point of every fee award . . . must be a calculation of the attorney's services in terms of the time he has expended on the case." *Serrano III*, 20 Cal.3d at 48 n.23. Mr. Brennan's reliance on this excerpt is misplaced.

First, as noted above, in *Serrano III* this Court noted that the common fund theory: (1) has been continuously applied by California courts since 1895; and (2) applies when "the activities of the party awarded fees have resulted in the preservation or recovery of a certain or easily calculable sum of money out of which sum or 'fund' the fees are to be paid." *Id.* Here, it is undisputed that the litigation resulted in a $19 million settlement – an easily calculable sum of money benefitting all class members. Thus, *Laffitte* is entirely consistent with *Serrano III*.

Second, this Court extensively discussed the common fund doctrine in ***Section II(a)*** of the *Serrano III* opinion. *Id.* at 34-38. The excerpt on which Mr. Brennan relies, however, appears in a footnote in ***Section V*** of the opinion. In fact, in Section II(a), the *Serrano III* Court merely concluded that the common fund approach was inappropriate in that particular case because the litigation did not create a common fund. In Section III of the Opinion, this Court approved the trial court's award of

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[3] Mr. Brennan's reliance on other non-common fund cases is similarly misplaced. (Petition at 20) (*citing In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1059, 2 Cal.Rptr.3d 358; *Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 112 Cal.Rptr.2d 284.

attorneys' fees under the private attorney general theory. *Id.* at 47 ("[T]he trial court acted within the proper limits of its inherent equitable powers when it concluded that reasonable attorneys fees should be awarded to plaintiffs' attorneys on the 'private attorney general' theory.") (footnote omitted). Then, in ***Section V*** of the opinion, the court addressed class counsel's argument that the fee awarded under the private attorney general theory was "inadequate" given the circumstances. *Id.* at 48-49. In Section V, the *Serrano III* Court held the trial court did not abuse its discretion in awarding fees, concluding that the "experienced trial judge is the best judge of the value of professional services rendered in his court." *Id.* at 49 (quotation omitted). Thus, the Court made its statement concerning the "starting point" for fee awards in the context of analyzing the amount of the award ***pursuant to the private attorney general theory***. This statement was ***not*** made in connection with the common fund theory. In fact, this statement has no application to the common fund theory because when the common fund theory applies, the proper methodology for awarding fees is to apply the percentage method whereby fees are awarded based on a percentage of the common fund.

F. Dicta From Various Cases Does Not Create An *Actual* Conflict.

Mr. Brennan contends that several other cases reveal an actual conflict with *Serrano III*. (Petition at 4-9). A careful review of the authorities on which Mr. Brennan relies demonstrates that this argument is without merit.

1. *Jutkowitz II*

The purported genesis of Mr. Brennan's ill-conceived "split of authority" argument begins with two statements in *Jutkowitz II*: (1) "the clear thrust of the holding in *Serrano* [*III*] . . . is a rejection of any 'contingent fee' principle in cases involving equitable compensation for

lawyers in class actions or other types of representative suits." (*Jutkowitz II*, 118 Cal.App.3d at 106) (quoted in Petition at page 6); and (2) "the correct amount of compensation cannot be arrived at objectively by simply taking a percentage of [the] fund [created]." *Id.* at 111.

As noted above, *Jutkowitz II* was not a common fund case and thus could not and did not create a split in authority regarding the use of the percentage method in a common fund case. Moreover, the language on which Mr. Brennan relies is taken entirely out of context. When considered in context, it is evident that it does not support Mr. Brennan's theory that a conflict exists regarding either the percentage method or the common fund theory.

As noted above, in *Jutkowitz II*, the court issued an attorneys' fees award based on those shareholders that were represented by class counsel. Class counsel, however, sought *additional* fees based on *unrepresented* shareholders who benefitted from the class litigation (but accepted a settlement offer prior to class certification). The appellate court rejected the claim for *additional* fees because: (1) class counsel had no attorney-client relationship with the unrepresented shareholders; and (2) the litigation did not create a common fund from which attorneys' fees could be paid. *Id.* at 109-10. The *Jutkowitz II* Court emphatically stated that the "critical point" for application of the common fund theory is the creation of a common fund "from which the attorney fees could be paid." *Id.* at 110. In short, *Jutkowitz II* merely held that absent an attorney-client relationship and absent the creation of a common fund, the common fund theory did not apply.

In dicta, the *Jutkowitz II* Court construed counsel's request for additional fees (based on the benefit to unrepresented shareholders) as an ill-conceived "attempt to engraft a 'contingent fee' concept onto the equitable common fund doctrine." *Id.* at 110. Thus, the statements in

Jutkowitz II on which Mr. Brennan relies simply rejected the adoption of contingent fee principles to award feeds where: (1) counsel does not represent the parties that received a benefit; and (2) no common fund exists. The dicta in *Jutkowitz II* does not repudiate the well-established rule that the common fund theory is viable method for awarding attorneys' fees.

Finally, it is worth noting that the dicta in *Jutkowitz II* is based entirely on language found in ***Section V*** of the *Serrano III* opinion. *See id.* at 108, 110 (*citing Serrano III*, 20 Cal.3d at 48 n.23). As noted above, Section V of the *Serrano III* opinion (containing language regarding the "starting point" for fee awards) was made in the context of analyzing the amount of an award pursuant to the private attorney general theory. That statement was ***not*** made in connection with the common fund theory (which was discussed exclusively in Section II(a)). This further undermines any claim that *Jutkowitz II* called into question the viability of the percentage method or the common fund theory.

2. *Salton Bay*

The next step in the purported evolution of Mr. Brennan's misguided "split of authority" argument is based on the following statement in *Salton Bay*: "On remand, the court should begin its analysis with a calculation of the attorney services in terms of time the attorneys actually expended on the case. *Salton Bay*, 172 Cal.App.3d at 957-58 (*citing Serrano III*, 20 Cal.3d at 48 n.23) (quoted in Petition at page 21).

As noted above, however, *Salton Bay* involved an award of *statutory* attorneys' fees in an inverse condemnation action based upon a contingency fee agreement. *Id.* at 950-51. *Salton Bay* did not involve class action litigation and, more importantly, did not involve or consider the application of the common fund theory. Thus, the statement in *Salton Bay* concerning the calculation of fees on remand is utterly irrelevant to the continuing validity of the common fund theory.

Moreover, as in *Jutkowitz II*, *Salton Bay*'s statement is based entirely on language found in Section V of the *Serrano III* opinion. *Salton Bay*, 172 Cal.App.3d at 957-58 (*citing Serrano III*, 20 Cal.3d at 48 n.23). Section V of the *Serrano III* opinion, however, was not related to the applicability or viability of the common fund theory. Thus, *Salton Bay* does not support Mr. Brennan's claim that there is a conflict among California authorities regarding the use of the percentage method in common fund cases.

3. *Yuki*

Mr. Brennan next relies on the following language in *Yuki* to supports his conflict theory: "The State . . . contends that it is improper for the trial court to start with the amount of the contingency fee and then work backwards, applying the various other factors in order to justify that amount." *Yuki*, 31 Cal.App.4th at 1771 (quoted in Petition at page 21). Mr. Brennan's reliance on *Yuki* is misplaced.

First, the cited language is not even part of the Court's holding. In fact, the Court reversed the fee award on the grounds that the surcharge awarded was improper and "not reasonably related to the services performed." *Id.* at 1772. As such, the Court expressly stated: "We need not resolve this question of methodology." *Id.*

Second, as noted above, *Yuki* involved an award of *statutory* attorneys' fees in an eminent domain action which was reversed on the ground that it contained an improper surcharge. *Id.* at 1759, 1768-69. As such, *Yuki*'s holding is utterly irrelevant regarding the continued viability of the common fund theory.

Finally, *Yuki*, like its predecessors, specifically relies on the "starting point" language found in Section V of the *Serrano III* opinion. *Id.* at 1771 (*quoting Serrano III*, 20 Cal.3d at 48 n. 23). For this additional, reason, it has no bearing on the viability of the percentage method in common fund cases.

4. *Dunk*

Mr. Brennan next relies on the following statements from *Dunk v. Ford Motor Co.*: (1) "The award of attorney fees based on a percentage of a 'common fund' recovery is of questionable validity in California."; and (2) "Later cases have cast doubt on the use of the percentage method to determine attorney fees in California class actions." *Dunk*, 48 Cal.App.4th at 1809 (quoted in Petition at page 6). Here, too, Mr. Brennan's reliance on *Dunk* is utterly misplaced.

First, as noted above, *Dunk* was not a common fund case as there was no easily calculable sum of money. *Id.* at 1809, 1810. As such, the Court unremarkably held that the common fund theory was not an appropriate method for awarding attorneys' fees. That holding is consistent with *Serrano III* and the application of the common fund theory in cases were a common fund exists.

Second, the statements on which Mr. Brennan relies are plainly dicta. Because the *Dunk* Court concluded that no common fund exists, any statements concerning the application of the percentage method in common fund cases were not essential to its holding and were mere dicta.

Third, the "later cases" to which the *Dunk* Court referred consisted of *Jutkowitz*, *Salton Bay* and *Yuki*. *See id.* at 1809 (*citing Yuki*, 31 Cal.App.4th at 1769; *Salton Bay*, 172 Cal.App.3d at 954; *Jutkowitz*, 118 Cal.App.3d a 110). As discussed above, those three cases fail to support the conclusion that the percentage method is inappropriate in common fund cases because: (1) they were not common fund cases; (2) their holdings were consistent with *Serrano III*; (3) the excerpts from those cases are clearly dicta; and/or (4) the out-of-context excerpts from those cases are unrelated to the common fund doctrine and/or based on a portion of *Serrano III* which did not discuss the common fund theory.

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5. *Lealao*

Finally, in *Lealao v. Beneficial California*, the Court stated: "Prior to [*Serrano III*], California courts could award a percentage fee in a common fund case. After *Serrano III*, it is not clear whether this may still be done. *Lealao*, 82 Cal.App.4th at 27 (*citing Dunk*, 48 Cal.App.4th at 1809). The *Lealao* Court also stated that language found "elsewhere" in *Serrano III* (i.e., Section V), regarding the "starting point" for every fee award "arguably renders it questionable whether a pure percentage fee can be awarded even in a conventional common fund case." *Id.* at 39 (*quoting Serrano III*, 20 Cal.3d at 48 n.23). Mr. Brennan seizes upon this language and argues that a conflict exists regarding the continued application of the percentage method in common fund cases. Here, too, his claim fails.

The class action settlement in *Lealao* ***did not create a common fund.*** As such, the Court simply held that attorneys' fees based on the percentage method could not be awarded pursuant to a common fund theory in that case. *See id.* at 37 ("*[P]ure* percentage fees have been rejected by the California Supreme Court, at least in cases such as this in which there is not a conventional common fund"). As such, these statements in *Lealao* concerning the percentage method in common fund cases are dicta. Moreover, in questioning the percentage method in common fund cases, the *Lealao* Court relied on Section V of *Serrano III* (which is unrelated to the common fund theory) and *Dunk* which, as noted above, fails to present a conflict regarding the continued viability of the percentage method in common fund cases.

In sum, ***no California appellate court has ever directly held that awarding fees based on the percentage method is inappropriate in common fund case.*** Thus, *Laffitte* does not contradict *Serrano III* and does not conflict with other California appellate authorities.

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2. Trial Courts Have Broad Discretion To Award Attorneys' Fees.

The *Laffitte* Court's approval of the percentage method in a true common fund case falls well within the bounds of the broad judicial discretion regarding attorneys' fees.

"[W]hat constitutes a reasonable fee in a representative action is a complex question to which there are no easy answers." *Consumer Privacy Cases*, 175 Cal.App.4th at 558. "[T]he fees approved by the trial court are presumed to be reasonable, and the objectors must show error in the award." *Dunk*, 48 Cal.App.4th at 1809. "A trial judge's determination of a reasonable amount of attorney fees will not be disturbed on appeal unless the appellate court is convinced that it is clearly wrong." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255, 110 Cal.Rptr.2d 145. "An appellate court reviews an award of attorneys' fees in the settlement of a class action under an abuse of discretion standard." *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1164, 102 Cal.Rptr.2d 777.

Here, the trial court acted properly and within its broad discretion by applying the percentage method to award attorneys' fees in this common fund case. Moreover, the trial court went beyond any requirement imposed by the percentage method and also performed a lodestar cross-check in concluding that the fee award was reasonable.

3. Mr. Brennan's Remaining Arguments Fail To Demonstrate Review Is Warranted.

Mr. Brennan contends that review is warranted to settle an important question of law. (Petition at page 10). As noted above, however, there is no actual conflict among California courts regarding the viability of the percentage of the fund method in a true common fund case. As such, there is no important issue of law to settle.

Mr. Brennan also raises several arguments against application of the percentage method in common fund cases. (Petition at pages 10-14). However, the percentage method has been recognized and applied since 1895 and no California appellate court has ever held that an attorneys' fees award based on a percentage of the fund is inappropriate in a common fund case. Thus, Mr. Brennan's various grievances concerning the percentage method provide no grounds for reviewing the methodology utilized in this case. Of course, even if the percentage method was somehow flawed, Mr. Brennan fails to acknowledge that the trial court actually conducted a lodestar analysis as a cross-check on the reasonableness of the fee award. By doing so, the trial court ensured that the fee award was reasonable when taken into account the wide-ranging factors included in a lodestar analysis. **Because the trial court actually applied a lodestar methodology in this case, Mr. Brennan's concerns fanciful "public policy" concerns regarding the percentage method are immaterial.**

Mr. Brennan also fails to explain why the percentage method must be used ***first*** when, as the case here, both methods (percentage method and lodestar) were analyzed and achieved an identical fee award. For example, if the trial court had applied the lodestar method first and applied the percentage method as a cross-check, the result would have been the same and the trial court would have awarded $6.3 million in attorneys' fees. *See, e.g., Chavez*, 162 Cal.App.4th at 66 n.11 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.") (quotation omitted); *Consumer Privacy Cases*, 175 Cal.App.4th at 558 n.13 (same).

Finally, Mr. Brennan contends that review is warranted by making the bald, unsupported claim that it is "unlikely this issue will be raised again soon." (Petition at page 15). Mr. Brennan offers no evidence for this

statement. Regardless, this is not a specified ground for review. *See* Cal. Rules of Court, Rule 8.500(b). This argument also actually weighs *against* granting the Petition, particularly when this appeal stems from a single objector out of 4,000 class members.

CONCLUSION

For all these reasons, this Court should deny the Petition.

Dated: January 12, 2015

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, the Answer To Petition For Review (Class Plaintiffs and Respondents) is proportionately spaced, has a typeface of 13 points or more and contains 8,208 words, including footnotes as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: January 12, 2015

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of 18 years and not a party to this action. My business address is 5670 Wilshire Boulevard, Suite 1460, Los Angeles, California 90036-5664, which is located in Los Angeles County, where the service herein occurred.

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