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

APPELLANT'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF LAWRENCE W. SCHONBRUN; [PROPOSED] ORDER

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

Attorney for Plaintiff Class Member-Appellant and Petitioner Francesca Muller

TO: The Court and to All Parties and Their Attorneys of Record:

PLEASE TAKE NOTICE that Appellant and Petitioner Plaintiff Class Member Muller submits this motion to request that the Court take judicial notice, pursuant to Evidence Code sections 452(d), and 459(a), and California Rule of Court 8.252(a)(1) of the following documents, copies of which are attached to the Declaration of Lawrence W. Schonbrun in support of this motion as Exhibits 1 through 7.

Exhibit 1 *Mostajo v. Anchor General Ins. Co.*, No. G033640, 2005 Cal.App.Unpub. LEXIS 2525 (4th App. Dist., Div. 3, Mar. 22, 2005).

Exhibit 2 *Williams v. Bre Property Investors, et al.*, No. A111414, 2006 Cal.App. Unpub. LEXIS 6850 (1st App. Dist., Div. 1, Aug. 7, 2006).

Exhibit 3 *Santiago v. Kia Motors America, Inc.*, No. G036985, 2007 Cal. App. Unpub. LEXIS 4792 (4th App. Dist., Div. 3, June 15, 2007).

Exhibit 4 *Bronk v. Talarico*, No. B1854000, 2007 Cal.App.Unpub. LEXIS 1540 (2d App. Dist., Div. 3, Feb. 28, 2007).

Exhibit 5 *Yip v. Zia, et al.*, No. B188228, 2007 Cal. App. Unpub. LEXIS 3243 (2d App. Dist., Div. 3, Apr. 24, 2007).

Exhibit 6 *Grinberg v. Maria's Holding Corp.*, No. B244535, 2013 Cal.App. Unpub. LEXIS 8324 (2d App. Dist., Div. 4, Nov. 18, 2013).

Exhibit 7 *Alonzo v. First Transit, Inc.*, No. B253699, 2015 Cal.App. Unpub. LEXIS 7415 (2d App. Dist., Div. 7, Oct. 15, 2015).

These unpublished opinions are included without regard to their particular facts or as authority on any legal issue. They are included merely to demonstrate that the issue regarding an unnamed class member's standing to appeal is often a focus of

unpublished appellate court decisions, as well as published opinions. That being the case, Appellant believes that this fact further demonstrates the need for this court to revisit its *Eggert v. Pacific States Savings and Loan Company, et al.*, 20 Cal.2d 199 (Apr. 21, 1942), decision.

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Lawrence W. Schonbrun and the attached exhibits, and such other matters as may properly come before this Court.

Dated: April 21, 2016

Respectfully submitted,

Lawrence W. Schonbrun

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

MEMORANDUM OF POINTS AND AUTHORITIES

1. Section 452(d) of the California Evidence Code provides, in pertinent part:

> Judicial notice may be taken of the following matters....:
> ....
> (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

2. Section 459(a) of the California Evidence Code provides:

> The reviewing court may take judicial notice of any matter specified in Section 452.

3. California Rules of Court, Rule 8.252(a)(1), provides:

> To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order.

4. Unpublished opinions may be cited for the purpose of showing conflicts in the law and the need for uniformity.

> [L]itigants often cite unpublished lower court opinions to demonstrate that lower courts are divided about a legal issue or that there is a recurring, unsettled issue that warrants review. Use of unpublished opinions in this manner does not violate the spirit of rule 8.1115 because the opinions are not being relied on for their precedential value, but rather to establish that review is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)
>
> A petition for review, for example, may point to unpublished cases to show conflicts among the courts on a particular issue, the frequency with which an issue arises, or the importance of an issue to litigants and society as a whole
>
> Plaintiff Magazine also notes that when petitioning the court for review, counsel "can show the need to 'secure uniformity' by citing conflicting published decisions and unpublished decisions.

> Citing unpublished decisions to show the issue is unsettled does not violate [rule 8.1115(a)] because the petitioner is not relying on the unpublished decision as precedent that should be followed." Daniel U. Smith & Valerie T. McGinty, Obtaining California Supreme Court Review, Plaintiff Magazine (Dec. 2012).
>
> The Supreme Court is even apparently amenable to the limited use in merits briefs of unpublished opinions. Recently in Williams v. Chino Valley Independent Fire Dist. (2015) 61 Cal.4th 97, 113, the court itself noted — without criticism— that the plaintiff "references an unpublished case" simply to demonstrate that "costs may in some FEHA cases be considerable."

Jessica M. Di Palma, "Using Unpublished Opinions in Calif. High Court Petitions," Horvitz & Levy LLP, www.law360.com.

5. California Evidence Code section 452 overrides the no citation rule:

> A recently published law review article concludes that "[i]n this battle between the no-citation rule and judicial notice [under Evidence Code 452(d)(1)], the statute overrides the rule. Inconsistency between the no-citation rule and the judicial notice statute is fatal to the former." Rafi Moghadam, *Judge Nullification: A Perception of Unpublished Opinions,* 62 Hastings L.J. 1397, 1400 (2011).
>
> One California Court of Appeal recognized the conflict with Rule 8.1115(a), stating that "[a]lthough [a] Court of Appeal opinion ... is not published, we may take judicial notice thereof as a court record pursuant to Evidence Code section 452, subdivision (d) (1)." *Gilbert v. Master Washer & Stamping Co.* (2001) 87 Cal.App.4th 212, 218, n.14 ["Although the court of appeal opinion in *Trope v. Katz*, 11 Cal.4th 274 [45 Cal.Rptr.2d 241] (Oct. 2, 1995), is not published, we make take judicial notice thereof as a court record pursuant to Evidence Code section 452(d)(1)" (at 218 n.14)] (taking judicial notice of an unpublished opinion of the California Court of Appeal to aid in the analysis of a subsequent appeal therefrom).

Scott Talkov, *Citing Unpublished Opinions: The Conflict between the No-Citation Rule and Judicial Notice* (Feb. 4, 2013), California Litigation Attorney Blog, http://www.rhlaw.com/blog.

Judicial notice is sought for a limited purpose, not for the persuasive value of the legal analysis or argument contained therein. These judicially noticed cases are of course not binding upon this Court.

Dated: April 21, 2016

Respectfully submitted,

Lawrence W. Schonbrun

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

DECLARATION OF LAWRENCE W. SCHONBRUN

I, Lawrence W. Schonbrun, declare:

1. I am a member of the bar of this Court and licensed to practice, etc.

2. I submit this Declaration in support of the Motion for Judicial Notice filed in connection with Appellant-Petitioner Class Member Muller's Petition for Review. I have personal knowledge of the facts set forth herein.

3. The attached unpublished opinions are not offered in any manner as authority for what is stated therein or the facts recited. They are offered merely to demonstrate that the issue of the standing of unnamed class members in class actions is frequently an issue in unreported cases. This circumstance further demonstrates this Court's need for clarification of *Eggert v. Pacific States Savings and Loan Company, et al.*, 20 Cal.2d 199 (Apr. 21, 1942) , in light of the *Restoration Hardware* decision.

4. None of these cases were presented to the trial court because this was not an issue in the trial court.

5. None of these cases were presented to the court of appeal as they were not thought relevant to the court of appeal's deliberations in light of the published opinions: *Wershba v. Apple Computer*, 91 Cal.App.4th 224 [110 Cal.Rptr.2d 145] (6th

App. Dist. July 31, 2001); *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); and *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc.*, 127 Cal.App.4th 387 (2d App. Dist., Div. 7, Mar. 7, 2005), which were cited by Class Member Muller in her Appellant's Reply Brief. Thusly, Class Member Muller did not request judicial notice in either the trial court or the appellate court for any of these decisions.

(a) Attached hereto as Exhibit 1 is a true and correct copy of *Mostajo v. Anchor General Ins. Co.*, No. G033640, 2005 Cal.App.Unpub. LEXIS 2525 (4th App. Dist., Div. 3, Mar. 22, 2005), an unpublished opinion that was obtained through LexisNexis.

(b) Attached hereto as Exhibit 2 is a true and correct copy of *Williams v. Bre Property Investors, et al.*, No. A111414, 2006 Cal.App. Unpub. LEXIS 6850 (1st App. Dist., Div. 1, Aug. 7, 2006), an unpublished opinion that was obtained through LexisNexis.

(c) Attached hereto as Exhibit 3 is a true and correct copy of *Santiago v. Kia Motors America, Inc.*, No. G036985, 2007 Cal. App. Unpub. LEXIS 4792 (4th App. Dist., Div. 3, June 15, 2007), an unpublished opinion that was obtained through LexisNexis.

(d) Attached hereto as Exhibit 4 is a true and correct copy of *Bronk v. Talarico*, No. B1854000, 2007 Cal.App.Unpub. LEXIS 1540 (2d App. Dist., Div. 3, Feb. 28, 2007), an unpublished opinion that was obtained through LexisNexis.

(e) Attached hereto as Exhibit 5 is a true and correct copy of *Yip v. Zia, et al.*, No. B188228, 2007 Cal. App. Unpub. LEXIS 3243 (2d App. Dist., Div. 3, Apr. 24, 2007), an unpublished opinion that was obtained through LexisNexis.

(f) Attached hereto as Exhibit 6 is a true and correct copy of *Grinberg v. Maria's Holding Corp.*, No. B244535, 2013 Cal.App. Unpub. LEXIS

8324 (2d App. Dist., Div. 4, Nov. 18, 2013), an unpublished opinion that was obtained through LexisNexis.

(g) Attached hereto as Exhibit 7 is a true and correct copy of *Alonzo v. First Transit, Inc.,* No. B253699, 2015 Cal.App. Unpub. LEXIS 7415 (2d App. Dist., Div. 7, Oct. 15, 2015), an unpublished opinion that was obtained through LexisNexis.

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.

Lawrence W. Schonbrun

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:

APPELLANT'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF LAWRENCE W. SCHONBRUN; [PROPOSED] ORDER

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

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

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

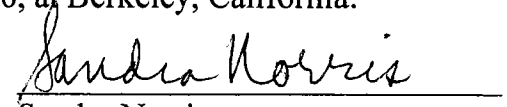
David F. McDowell Jr., Esq.
Purvi G. Patel, Esq.
Morrison & Foerster LLP
707 Wilshire Blvd., Ste. 6000
Los Angeles, CA 90017
Tel: (213) 892-5200
Fax: (213) 892-5454
dmcdowell@mofo.com
PPatel@mofo.com
Attorneys for Defendant Restoration Hardware, Inc.

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

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

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

Executed on April 21, 2016, at Berkeley, California.



Sandra Norris

JOCELYN MOSTAJO et al., Plaintiffs and Respondents, v. ANCHOR GENERAL INSURANCE COMPANY, Defendant and Respondent; KARA RYAN, Movant and Appellant.

G033640, G033944

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

2005 Cal. App. Unpub. LEXIS 2525

March 22, 2005, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: Appeals from orders and judgment of the Superior Court of Orange County, No. 03CC00087. David C. Velasquez, Judge, and John K. Trotter, Referee.

DISPOSITION: Appeals dismissed.

COUNSEL: Law Offices of Laurence F. Padway and Laurence F. Padway for Movant and Appellant.

Kroll Law Corporation, Gerald L. Kroll and Carrie Santulli Schudda for Plaintiffs and Respondents Jocelyn Mostajo and Eileen McBath.

Michelman & Robinson, Sanford L. Michelman and Catherine L. Rivard for Defendant and Respondent Anchor General Insurance Company.

JUDGES: RYLAARSDAM, ACTING P. J.; BEDSWORTH, J., MOORE, J. concurred.

OPINION BY: RYLAARSDAM

OPINION

Movant Kara Ryan (appellant) has filed two appeals in the above named action. Her first appeal (G033640) challenges orders: (1) Approving a settlement that plaintiffs Jocelyn Mostajo and Eileen McBath reached with defendant Anchor General Insurance [*2] Company (Anchor) in the underlying action; (2) certifying the case against Anchor as a class action; and (3) denying appellant's ex parte application to intervene in the action. The second appeal (G033944) challenges the final judgment entered in this case. Since appellant chose to exclude herself from the settlement class, she lacks standing to maintain these appeals and they are dismissed.

FACTS

The Orange County Action

In March 2003, Mostajo filed a complaint in the Orange County Superior Court suing numerous insurance companies, including Anchor, for restitutionary and injunctive relief under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) (*Mostajo v. Aegis Security Insurance Company et al.*, No. 03CC00087.) The complaint alleged the insurers routinely inserted insurance cancellation notices for nonpayment of the premium in the regular automobile insurance premium bills sent to their insureds. Mostajo alleged this practice violates Insurance Code provisions requiring that an insurer afford a policyholder at least 10 days notice of cancellation for premium nonpayment *after* the premium payment was due and unpaid. [*3] As a result, insureds who failed to timely pay their premiums were being denied policy benefits or required to pay additional assessments, including "'reinstatement' fees, additional down payments, [or] re-write fees" to maintain their insurance. Mostajo sought disgorgement of any unlawfully imposed assess-

ments, restitution, plus an injunction against further use of the allegedly illegal practice.

Beginning in September, Mostajo engaged in settlement negotiations with some of the insurers, including Anchor. Mostajo and Anchor reached a settlement in December. The agreement called for severing the action against Anchor from the lawsuit, submitting it to retired Justice Trotter as a general reference, amending the complaint as to Anchor to allege it was being maintained as a class action, and certifying the matter as such. By a subsequent order, plaintiff Eileen McBath was added as a party against Anchor based on allegations she had a policy with Anchor and had received the allegedly unlawful cancellation notices from it.

The agreement defined the class as "all persons who purchased an Anchor insurance policy in California within four years of the date of filing [the] Action [*4] or while the Action has been pending, and whose policies were cancelled for alleged non- payment of premium when there was no default in payment of the premium at the time the notice of cancellation was mailed." Under the settlement, Anchor agreed to: (1) Comply with California law in issuing automobile policy cancellation notices; (2) establish a fund not exceeding $ 791,500 to pay claims and litigation expenses; (3) issue court-approved notices of the settlement to all class members at their last known address; (4) send a claim form to any class member timely requesting one; and (5) investigate and resolve timely filed claims. For any claim that Anchor rejected, the affected class member could submit it to the referee for a final determination as to the claim's validity. The settlement awarded plaintiffs' attorneys $ 125,000 in fees payable in two installments, plus incentive awards to Mostajo and McBath.

Justice Trotter signed an order on December 16, preliminarily approving the parties' settlement. That order also approved a form notice of settlement to be sent to potential class members. In part, the form advised a recipient "To exclude yourself from the Class, you must submit [*5] a request for exclusion to the Referee at the aforementioned address so that it is received no later than February 6, 2004."

Appellant is the plaintiff in a lawsuit against Anchor commenced in March 2002 seeking damages for breach of contract, bad faith, and fraud, plus injunctive relief for under the unfair competition law. (*Ryan v. Anchor General Insurance Company et al.*, Super. Ct. Alameda County, No. 2002044222.) On January 26, 2004, she filed an ex parte application in the Orange County action seeking, inter alia, vacation of the class certification, extension of the time to either file claims or opt out of the class, establishment of a discovery schedule on class certification, and granting her intervenor status. The referee held a telephonic hearing on the application and denied all of appellant's requests.

Appellant's attorney sent the referee a letter on February 9. Counsel objected to the referee's denial of appellant's discovery request, "to being compelled to opt out" before being allowed to challenge class certification or valuation of the proposed settlement, and declaring she "intends to appeal . . . [the] order denying her leave to intervene in the case." But [*6] in the very next paragraph, counsel stated: "However, in view of your order . . . that [appellant] must exercise her option to opt out no later than February 10, 2004 at 5:00 p.m., and your refusal of her request to further extend the time to opt out, and without waiver of her right to appeal that order, she does hereby, opt out of the class."

After a scheduled hearing on February 19, Justice Trotter granted final approval of the *Mostajo* class settlement. In a footnote, the order acknowledged appellant's objection to the settlement, but stated she "has no standing to object after opting out of the class . . . ." Appellant filed her first notice of appeal, challenging the February 19 ruling, the order certifying the case as a class action, and the denial of her February 9 ex parte application.

The trial court entered final judgment in the *Mostajo* action on March 23, 2004. It contained a footnote recognizing appellant lacked standing to object to the settlement because she opted out of the class. Appellant then filed her second notice of appeal, challenging the judgment.

The Alameda County Action

Appellant filed her original complaint in March 2002. It alleged [*7] she had an automobile insurance policy with Anchor and its predecessor, Western Family Insurance Company. She failed to timely make a premium payment due on January 28, 2002, and several days later, her car was destroyed in an accident. Appellant notified Anchor of the loss but it denied coverage on the basis of appellant's failure to timely make the January 28 premium payment. She alleged Anchor was "prohibited [by] law from denying coverage" because of its "policy and practice of canceling policies issued to insureds who pay on an installment basis without sending a cancellation notice after the occurrence of a delinquency in payment."

The second amended complaint, filed November 17, 2003, alleged appellant's unfair competition law "claim . . . is brought . . . both in her individual capacity and as [a] 'private attorney general' seeking injunction and restitution on behalf of all those insured by defendants who were wrongfully denied coverage under the scheme alleged . . . ." On December 2, appellant filed a motion for

summary judgment on her unfair competition law claim. The motion sought to enjoin Anchor "from cancelling policies without giving the notice required by" statute. [*8] It also sought restitution in the form of "(1) restoring the coverage . . . cancelled illegally (2) retracting the notices of cancellation and notifying those affected about that retraction and (3) tolling the statute of limitations from the date of the illegal cancellation until the date of the corrected notice restoring coverage for any claims which may have arisen during the time in which the coverage was illegally cancelled."

The Alameda court initially heard this and other matters in mid-December 2003 and continued them. It granted appellant's motion on February 3, 2004. On February 27, the court issued a decree conforming to appellant's requested relief.

DISCUSSION

Appellant asserts several arguments on the merits of her appeals. However, the initial question is whether we have jurisdiction to hear either appeal. (*Jennings v. Marralle (1994) 8 Cal.4th 121, 126*; *Allabach v. Santa Clara County Fair Assn. (1996) 46 Cal.App.4th 1007, 1010.*)

Appellant's first appeal challenges three orders. Two rulings cannot be challenged by direct appeal. An order certifying a case as a class action is not an appealable ruling. (*In re Cipro Cases I & II (2004) 121 Cal.App.4th 402, 409.*) [*9] Nor are we aware of any authority declaring an order approving a settlement, including a class settlement, constitutes an exception to the general rule that an appeal may only be taken from the final judgment in an action. (*Code Civ. Proc., § 904.1, subd. (a)(1).*) The third order, denying appellant's application to intervene in the *Mostajo* action, is independently appealable. (*Bame v. City of Del Mar (2001) 86 Cal.App.4th 1346, 1363.*) But it would not permit appellant to challenge the trial court's judgment. (*County of Alameda v. Carleson (1971) 5 Cal.3d 730, 736, 97 Cal. Rptr. 385*; *Braun v. Brown (1939) 13 Cal.2d 130, 133.*)

The second appeal is from the final judgment. But a question exists as to whether appellant has standing to challenge it as a "party aggrieved" by the judgment. (*Code Civ. Proc., § 902.*) Generally, unnamed class members lack standing to appeal the judgment unless "they take . . . appropriate steps to become parties to the record." (*Eggert v. Pac. States S. & L. Co. (1942) 20 Cal.2d 199, 201.*) But "a member of the affected class who [*10] appears at the hearing in response to the notice [of hearing on the proposed settlement of the action][] and . . . objects to the proposed settlement . . . is a party aggrieved, and has standing to appeal. [Citation.]" (*Trotsky v. Los Angeles Fed. Sav. & Loan Assn. (1975) 48 Cal. App. 3d 134, 139, 121 Cal. Rptr. 637.*)

Appellant's ex parte application clearly reflects she opposed the proposed settlement in the *Mostajo* action. Nonetheless, by subsequently choosing to exclude herself from the *Mostajo* class, appellant eliminated her standing to appeal both the denial of her intervention request and the judgment. (*Rebney v. Wells Fargo Bank (1990)220 Cal. App. 3d 1117, 1134-1135* [party that opted out of class action's monetary settlement not entitled to maintain appeal from injunctive relief portion of settlement].)

In rebuttal, appellant cites *Marsh v. Mountain Zephyr, Inc. (1996)43 Cal.App.4th 289* for the proposition "a non-party may acquire appellate standing." *Marsh* concerned an appeal by an expert witness from a court order setting the hourly fee the opposing party needed to pay the witness for testifying at [*11] his deposition. The Court of Appeal held the witness had standing to appeal the ruling as a final order on a collateral matter directing the payment of money. "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.' [Citations.]" (*Id. at p. 295.*)

As *Marsh* makes clear, this exception only applies where the judgment or order would be binding on the party seeking to challenge it. But here, by choosing to opt out of the *Mostajo* class, appellant is not bound by the trial court's judgment in this case (*In re Corrugated Container Antitrust Litigation (5th Cir. 1985) 756 F.2d 411, 418-419)*, and that judgment will have no res judicata or collateral estoppel effect on her right to obtain relief in her own lawsuit against Anchor.

Such a result is particularly appropriate here. First, appellant is prosecuting her own separate action against Anchor. Second, the notice of settlement sent to class members stated one desiring to be excluded from [*12] the class needed to do so by February 6, 2004. Appellant missed that deadline. While the referee denied her request to extend the time for all potential class members to opt out of it, the referee did extend the time for appellant to opt out until the end of the business day on February 10. Appellant took advantage of this extension, declaring her intent to opt out in the February 9 letter. Both the referee and the trial court took note of her decision in determining there were no objections to the class settlement.

Thus, appellant lacks standing to appeal the trial court's rulings, including the denial of her application to intervene in this action.

DISPOSITION

The appeals in G033640 and G033944 are dismissed. Respondents shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.

HELEN WILLIAMS, Plaintiff and Appellant, v. BRE PROPERTY INVESTORS et al., Defendants and Respondents.

A111414

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

2006 Cal. App. Unpub. LEXIS 6850

August 7, 2006, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: San Francisco County Super. Ct. No. CGC-04-428667.

JUDGES: Margulies, J.; Stein, Acting P.J., Swager, J. concurred.

OPINION BY: Margulies

OPINION

Helen Williams sued her former landlords, BRE Properties, Inc. and BRE Property Investors, LLC (collectively, BRE), for making improper deductions from her security deposit. Williams's complaint was styled as a class action lawsuit brought on behalf of herself and all other similarly situated former BRE tenants. Before any class certification motion was filed, the trial court dismissed the complaint as a terminating sanction when Williams's counsel advised that he could not produce her for her noticed deposition. Counsel informed the trial court that he had lost contact with Williams and believed she was no longer willing to participate in the case. The present appeal, filed by Williams's counsel on his own volition, must [*2] be dismissed because it was not authorized by a party with standing to appeal.

I. BACKGROUND

In February 2004, Helen and Milton Williams filed a putative class action suit against their former landlord, BRE, for engaging in an alleged practice of deducting an excessive amount of their former tenants' security deposits after they moved out. BRE was served with the original complaint in August 2004. Milton Williams passed away during the latter half of 2004. An amended class action complaint designating Helen Williams as the only named plaintiff was filed in March 2005.

The amended complaint alleged that BRE had a general business practice of making deductions from tenant security deposits "for [the] replacement or full refurbishment of items in [their rental] units" without taking into account or itemizing for the tenants "the standard depreciated value of such items." Three causes of action were asserted: (1) violation of *Civil Code section 1950.5* and *Business and Professions Code section 17200*; (2) conversion; and (3) violation of the Consumer Legal Remedies Act, *Civil Code section 1750 et seq.*

[*3] The alleged class consisted of "persons who have, within the statutory period, as residential tenants in [BRE's] California properties, deposited sums with [BRE] as security deposits on rental units, of which [BRE] retained sums purportedly for replacement or full refurbishment of items in units, but which did not account for the standard depreciated value of such items." The alleged class was never certified, and no motion for class certification was pending in the action before it was dismissed.

In December 2004, BRE served Helen and Milton Williams with notices of deposition compelling them to appear for deposition on January 13, 2005. Plaintiffs' attorney, Ron Bochner, objected to the deposition notice. On January 7, 2005, unaware that Milton Williams had

passed away, BRE moved to compel the Williamses to appear for their depositions. BRE learned from Bochner's opposition to the motion to compel that Milton Williams had died, and pursued the motion only as to Helen Williams. On February 3, 2005, the trial court issued a tentative ruling ordering Williams to appear for deposition no later than February 28, 2005. Neither party contested the tentative ruling and it became [*4] the court's order.

On February 3, BRE's counsel, Jennifer Redmond, faxed a letter to Bochner proposing alternate dates for Williams's deposition. The following day she spoke to Bochner by telephone. Bochner stated that he had not yet spoken with Williams and did not know her availability. On February 10, having not heard from Bochner, Redmond faxed him another letter requesting that he check with Williams and get back to her at his earliest convenience. Bochner did not respond. Redmond faxed another letter on February 15, again requesting dates in February on which Williams would be available for the taking of her deposition. Bochner again did not respond. Redmond made one last attempt to contact Bochner about scheduling the deposition, by fax sent on February 23, 2005. Bochner responded on February 25, 2005, telling Redmond that he had been unable to contact his client, but that he was continuing to make efforts to do so.

On March 17, 2005, BRE moved for terminating sanctions against Williams for her refusal to be deposed. In his declaration in opposition to the motion, filed on March 29, Bochner averred as follows: "The undersigned has been unable to contact plaintiff. It is apparent [*5] that she, for reasons which are unknown, no longer can or does not want to act as a representative of the class. This fact was unknown to [me] at the time that the motion [to compel Williams's deposition] was heard and the ruling made."

The trial court granted BRE's motion, finding there was no reasonable possibility that: (1) Williams would comply with the order to attend her deposition, or (2) additional orders for her to comply with discovery obligations were likely to result in compliance. The court accordingly granted terminating sanctions. Based on the order granting terminating sanctions, an order dismissing Williams's complaint with prejudice was entered on May 19, 2005 without further hearing. A notice of appeal signed by Bochner, and designating Williams as the appellant, was timely filed thereafter.

II. DISCUSSION

Bochner, purporting to represent the interests of the class of tenants alleged in the amended complaint, argues that the trial court: (1) erred in dismissing it, and (2) should have allowed an opportunity for the complaint to be amended to add a new representative plaintiff. In response, BRE maintains that this court must dismiss the appeal because [*6] it has been brought by Bochner without any authorization from a client with standing to appeal. We agree with BRE.

The facts and holding of *In re Alma B. (1994) 21 Cal.App.4th 1037* (*Alma B.*) are instructive in this case. *Alma B.* was a juvenile dependency proceeding in which the attorney representing the minors' drug-addicted mother signed and filed a notice of appeal from an order designating adoption as the minors' permanent placement goal without the mother's express authorization. (*Id. at p. 1043.*) The mother had attended only the first day of the three-day hearing which resulted in the appealed order. (*Id. at p. 1042.*) Her attorney had not spoken to her since that day, and did not know her whereabouts when he filed the appeal. (*Id. at p. 1043.*) In conjunction with the notice of appeal, the attorney signed a declaration averring that he had filed it based on his belief from previous communications with his client that she wanted custody of her children, and would want the appeal to be prosecuted. (*Ibid.*)

Despite the attorney's representations, the Court of Appeal held in *Alma B.* that dismissal [*7] of the appeal was required "[b]ecause we cannot impute Alma's authorization for her trial counsel to appeal orders made after her disappearance." (*Alma B., supra*, 21 Cal.App.3d at p. 1043.) The court formulated the legal principle involved as follows: "Because an attorney cannot appeal without the client's consent, a notice of appeal shown to have been signed by an unauthorized attorney is ineffectual in preserving the right to appeal." (*Alma B., at p. 1043*, citing *Guardianship of Gilman (1944) 23 Cal.2d 862, 864 & Isom v. Slaughter (1962) 200 Cal.App.2d 700, 705, 19 Cal. Rptr. 541*; accord, *Bryan v. Bank of America (2001) 86 Cal.App.4th 185, 192, fn. 3.*)

In the case before us, Bochner cannot even claim an implicit authorization to proceed with this appeal. His client disappeared before BRE moved for or obtained the order appealed from, and he has had no contact with her since that time. By Bochner's own account, she had lost interest in participating as a party to this action and stopped communicating with her attorney about it well before he filed the notice of appeal. Under the rule stated in *Alma B.* and [*8] earlier cases, the appeal is unauthorized and must be dismissed.

The fact that the complaint includes class action allegations does not make the appeal justiciable in this court. The notice of appeal signed by Bochner states: "Plaintiff appeals from the Dismissal entered on May 19, 2005 . . . ." Williams is the only named plaintiff in the amended complaint. Her authorization was required in order to properly initiate this appeal. Even if the notice of appeal could somehow be construed to encompass un-

named class members, Bochner did not represent such persons when the notice of appeal was filed and could not appeal on their behalf. (See *Koo v. Rubio's Restaurants, Inc. (2003) 109 Cal.App.4th 719, 736* [potential class members are not deemed to be represented by class counsel before certification]; *Cal Pak Delivery, Inc. v. United Parcel Service, Inc. (1997) 52 Cal.App.4th 1, 12* [attorney-client relationship between plaintiff's counsel and class members is created by certification of the class].)

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. [*9] (*Code Civ. Proc., § 902*; see *Eggert v. Pac. States S. & L. Co. (1942) 20 Cal.2d 199, 201*; see also, *West v. Health Net of the Northeast (D.New Jersey 2003) 217 F.R.D. 163, 176* [if named plaintiffs lose standing before class certification motion is filed, unnamed plaintiffs have no justiciable claim].) Absent certification of a class, the dismissal of Williams's complaint has no binding effect on other members of the putative class who have no notice of the action and are not considered parties to it for purposes of res judicata or collateral estoppel. (*Home Sav. & Loan Assn. v. Superior Court (1976) 54 Cal.App.3d 208, 212, 126 Cal. Rptr. 511*; *Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal.App.3d 1006, 1011, 117 Cal. Rptr. 485*; see also, *Aguilera v. Pirelli Armstrong Tire Corp. (9th Cir. 2000) 223 F.3d 1010, 1013, fn. 1* [when a motion is maintained against an uncertified class, only the named plaintiffs are affected by the ruling; there is no res judicata effect as to unnamed members of the purported class].) We are not persuaded otherwise by Bochner's conclusory [*10] assertion that class members' rights would be "vitiated" in some unspecified fashion if the current dismissal is allowed to stand.

The cases upon which Bochner principally relies-*Shapell Industries, Inc. v. Superior Court (2005) 132 Cal.App.4th 1101* and *La Sala v. American Sav. & Loan Assn. (1971) 5 Cal.3d 864, 97 Cal. Rptr. 849*-both involved appeals that were properly authorized by parties with standing to appeal. No principle recognized in those cases, nor any demonstrable prejudice to absent class members in this case, justifies departing from those fundamental requirements.

III. DISPOSITION

The appeal is dismissed.

Margulies, J.

We concur:

Stein, Acting P.J.

Swager, J.

MARIA SANTIAGO et al., Plaintiffs, v. KIA MOTORS AMERICA, INC., Defendant and Respondent; LIEFF, CABRASER, HEIMANN & BERSTEIN LLP, Objector and Appellant.

G036985

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

2007 Cal. App. Unpub. LEXIS 4792

June 15, 2007, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: [*1]

Appeal from an order of the Superior Court of Orange County, No. 01C, C01438. Ronald L. Bauer, Judge.

DISPOSITION: Appeal dismissed.

COUNSEL: Lieff, Cabraser, Heimann & Bernstein, Robert J. Nelson and Daniel M. Hutchinson for Objector and Appellant.

Gordon & Rees, Kevin Alexander, Tom Stoddard and Stephanie Alexander for Defendant and Respondent.

JUDGES: SILLS, P.J.; RYLAARSDAM, J., O'LEARY, J. concurred.

OPINION BY: SILLS

OPINION

I. BACKGROUND

Eight state court class actions were filed against Kia Motors based on an allegedly defective front braking system in its 1997 through 2000 Sephia models: California, Pennsylvania, New Jersey, Tennessee, North Carolina, Florida, Illinois and Alabama. Additionally, a federal court class action was filed in Florida. The law firm of Lieff, Cabraser, Heimann & Berstein, hereinafter "Lieff & Cabraser," is counsel of record for the putative class only in the federal Florida action.

A *47-state* settlement -- not including Florida -- was tentatively reached in this California action, *Maria Santiago et al. v. Kia Motors* (Super Ct. Orange County, 2005. No. 01CC01438) in May 2005. (Pennsylvania and New Jersey were also not part of the settlement. [1] The proposed settlement provided a potential payout of $8 million [*2] to the 47-state class, with payments to each consumer capped at $275. In June 2005, counsel from the state actions in Illinois, Tennessee, and North Carolina, plus Lieff & Cabraser, filed objections to the proposed settlement. [2]

1 A Pennsylvania state court had just *rejected as inadequate* a proposed settlement in which Kia's overall obligation would be capped at $16 million nationwide, and payments to each consumer would be capped at $275 for break repair, and ordered the matter proceed to trial. At trial, the Pennsylvania jury awarded a *statewide* class $5,641,200 and each consumer was to receive a maximum of $600.

2 Lieff & Cabraser filed a seven-page objection to this proposed settlement, claiming the agreement affected the rights of the putative nationwide class it sought to represent in the Florida federal action, and also argued the settlement was too small given that a Pennsylvania state court had rejected a larger one as too small. Lieff & Cabraser urged the court "to take the more prudent course of allowing the parties a chance to

attempt a single global [nationwide] resolution of the case."

Over the course of the next few months the proposed settlement was modified: The overall [*3] cap was increased to $14 million with a $600 maximum payout per consumer, and Kia undertook the costs of administration. On the attorney fee issue, Kia agreed to provide $2.1 million in attorney's fees, exclusive of the $14 million total liability already included in the enhanced settlement, to counsel on the Illinois, Tennessee, North Carolina, and California cases, i.e., to counsel representing plaintiffs within the 47-state area covered by the settlement. However, Kia did not want to fund any fees for Lieff & Cabraser. The notice of the settlement provided to consumers alerted them to the fact that Lieff & Cabraser were seeking up to another $500,000, but there was no "fund" established by Kia from which any fee claim by Lieff & Cabraser might be paid.

Lieff & Cabraser's claim for attorney fees was heard in late January 2006, with the counsel on the Illinois, Tennessee, North Carolina, and California cases weighing in on their side. Lieff & Cabraser was with them "shoulder to shoulder all the way." [3] A mainstay of the argument was that Lieff & Cabraser could have supported an inferior settlement in the federal Florida action, [4] but supported California's jurisdiction in order to [*4] obtain a better settlement for the class.

3 Since this is not a common fund case, the Lieff & Cabraser's fellow class attorneys had nothing to lose by siding with them. Those counsel had been assured *their* $2.1 million in the settlement; any recovery by Lieff & Cabraser against Kia was not going to come out of any fund in which they had an interest.

4 Things weren't going all that well in Florida. On January 4, 2006, the Florida district court had ruled it should abstain from exercising jurisdiction because the matter would be duplicative given the Pennsylvania verdict and the pending California settlement.

Although the court did not include any written justification for its order, it denied Lieff & Cabraser's application for fees and costs in its entirety. [5]

5 Here are the trial court's reasons for the denial as gleaned from the record of the January 23 hearing:

(1) There was no basis in the law for an award of fees from the defendant based on the facts of the case.

(2) There was a "willful lack of supporting evidence about the hours and the efforts" expended on the case, and certain supplemental declarations filed in mid-January were "untimely."

(3) Lieff & Cabraser was "largely unsuccessful" [*5] in achieving its goal of obtaining a 50-state settlement.

(4) Lieff & Cabraser grossly overstated its fee claim, by including work done by co-counsel in the Florida federal action who "had virtually nothing to do with" the 47-state settlement. In that regard, court cited language from *Serrano v. Unruh (1982) 32 Cal.3d 621, 635* that supported denial of a fee application in its entirety when a request is "overreaching." (See *Serrano v. Unruh (1982) 32 Cal.3d 621, 635* [a "fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether"].)

Lieff & Cabraser then filed this appeal from the order of denial. Kia has filed a motion to dismiss the appeal arguing Lieff & Cabraser lacks standing to appeal. We note that the firm has filed with this court a certificate of interested entities or persons and includes the names of five *non-party* class members as their clients, as well as non-party law firms (apparently co-counsel in Florida).

III. DISCUSSION

A. *Non-Party Status*

To appeal, you must be a party, even in a class action. (E.g., Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2006), [*6] P 2:272. p. 2-135 ["A person who never was a party of record in the trial court lacks standing to appeal an appealable judgment or order rendered in that proceeding."].) Even being an attorney for a party of record does not confer standing on the attorney to appeal. (*Ibid.* ["For example, *attorneys* of record for the parties are *not themselves* 'parties' to the action and thus cannot appeal from a judgment or order in the action."].) As the court said in *In re Marriage of Tushinsky (1988) 203 Cal. App. 3d 136, 143*, "[A]n attorney is not a 'party aggrieved' within the meaning of *section 902 of the Code of Civil Procedure* with regard to a judgment purporting to rule on the attorney's [fees]. . . . The [judgment] has no legal import with respect to adjudication of the attorney's claim for fees and costs from his client, who is a party to that action."

A Supreme Court decision requiring dismissal of an appeal by non-parties to a class action, *Eggert v. Pac. States S. & L. Co. (1942) 20 Cal.2d 199* (*Eggert*), applies a fortiori to this case. In *Eggert*, a state class action was

brought by the holder of a savings certificate, Eggert, against a savings and loan and the state guaranty corporation [*7] on behalf of the certificate holder himself and 1,500 other certificate holders. The trial court judgment resulted in a payout of some $1.9 million to the class, and attorney fees were to be deducted from that amount. Two individuals, Kelley and Given, were listed on an exhibit to the judgment as certificate holders. The attorney for Kelley and Given appeared at hearing on attorney fees, and objected to a petition to fix fees at 15 percent. The trial court granted the petition, and Kelley and Given filed a notice of appeal for themselves and all other holders of certificates "not otherwise represented by counsel." (*Id. at p. 200.*) Eggert responded by a motion to dismiss the appeal, but limited the motion to dismiss to all certificate holders "other than" Kelley and Given.

On its own, our Supreme Court dismissed the appeal as to *all* appellants, not just Kelley and Given. (*Eggert, supra, 20 Cal.2d at p. 201.*) "The motion to dismiss the appeal is properly made," said the court, "for it is a settled rule of practice in this state that only a party to the record can appeal." (*Id. at pp. 200-201.*) The motion to dismiss was granted because the "appellants" -- including Kelley and Given -- "were [*8] not named as parties to the action nor did they take any appropriate steps to become parties to the record. (*Id. at p. 201.*) 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 to the record." (*Ibid.*) Moreover, "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." (*Ibid.*) And since "appellants have no standing to appeal," it was also "unnecessary to consider their right to appeal in a representative capacity on behalf of other certificate holders." (*Ibid.*) Thus, even though the "motion to dismiss the appeal was made only as to certificate holders other than Jessie C. Kelley and Dorothy C. Given," the Supreme Court said "this court may dismiss an improper appeal on its own motion," and promptly did so. (*Ibid.*)

To the degree that there are any differences between *Eggert* and the present case, those differences run even more in the direction of dismissal here. In *Eggert*, the appeal [*9] was brought on behalf of real consumers, who were actually affected by the judgment (the certificate holders listed in the judgment). Here, there is no evidence that Lieff & Cabraser represent any consumers who are actually affected by the 47-state settlement. There is nothing on the certificate of interested parties to indicate the residence of those parties, and the natural presumption is that the five non-party members are represented by Lieff & Cabraser in the federal Florida action. (However, even if the list includes one or more residents of the 47 states covered by the settlement, it would make no difference, as happened in *Eggert.*) In *Eggert*, the consumers who objected to the attorney fee award (on behalf of attorneys for a properly appearing plaintiff) had a palpable interest in the attorney fee petition -- the larger the plaintiff's attorney fee award, the smaller the recovery due the rest of the class. Here, none of the class members represented by Lieff & Cabraser would be affected by any fee award paid, or not paid, by Kia to Lieff & Cabraser. If, in *Eggert*, the Supreme Court still dismissed, for lack of standing, the appeal of real consumers who were actually named in [*10] and affected by the judgment, how much more should we dismiss, for lack of standing, the appeal of attorneys who do not represent real consumers in the case.

On the other hand, the *similarities* in the two cases are dispositive. Here, like *Eggert*, we have appellants who are not parties, and never became parties. (There is no hint that Lieff & Cabraser ever sought to formally intervene in Maria Santiago's action.) The clients they represent as evidenced on the certificate of interested parties form all have "Non-party" checked. And while the five "Class Member/Client" names have an asterisk asserting that they were each "a non-party objector," that differs in no way from Kelley and Given in *Eggert*, who were also "non-party objectors," except that, as noted above, Kelley and Given had more at stake in the judgment from which the appeal was taken than anyone now represented by Lieff & Cabraser.

The case before us substantively differs from *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal.App.4th 387. Mrs. Gooch's* involved a class member who appeared on his own behalf (though represented by an attorney) at a fairness hearing and argued for things other than just [*11] naked attorney fees. The appellate court rejected the contention that the class member lacked standing to appeal, simply citing to a rule developed in the Court of Appeal that a class *member* who "appears at a fairness hearing and objects to a settlement affecting that class member" has standing even if that "member did not formally intervene in the action." (*Id. at p. 395.*) The *Mrs. Gooch's* court found the substantive aggrievement in the denial of the *client's* request that the defendant pay his attorney fees. (*Id. at p. 396.*)

To the degree, of course, that the rule relied on by the *Mrs. Gooch* court might arguably be read to contradict *Eggert*, the latter case controls. (*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.*) [6] *Mrs. Gooch's* did cite *Eggert* to recognize that aggrievement is necessary for standing, but did not discuss its implications concerning "non-party" objectors. For the moment,

though, it is enough for us to realize that a class member who appears in a class action fairness hearing and objects to the merits of a settlement that affects the class member in his role as a class member is different from lawyers appearing on their own behalf arguing for their [*12] own fees. (See *Wong v. Superior Court (1966) 246 Cal. App. 2d 541, 545* ["Although attorney fees allowed may in the discretion of the court be made payable to the attorney, they are granted for the benefit of the party concerned. An attorney's right thereto is indirect and is derived from his client."].)

> 6 We found nothing to cast any doubt on the continued vitality of the *Eggert* case, which was cited with approval in *Rice v. Alcoholic Bev. etc. Appeals Bd. (1978) 21 Cal.3d 431, 436, fn. 4* for the black-letter proposition that "a person who is not a party of record to the proceeding below has no standing to appeal."

B. *Substitution*

Anticipating a standing problem, Lieff & Cabraser requests that this court grant leave to substitute the objecting class members it represents if the court decides it lacks standing to appeal.

No less than four independent reasons require denial of the request. First off, no proper motion to substitute has been made. (See *Cal. Rules of Court, rule 8.768(a)* [substitution "shall be made by proper proceedings instituted for that purpose in the trial court"].)

Second, more substantively, the effort runs afoul of the *Eggert* case. In *Eggert*, non-party objecting class [*13] members had no standing because they never became parties at the trial level. All the substitution request would do here is to replace non-party attorneys with non-party class members. Those non-party class members would still have no standing under *Eggert*, either in their own right, or as representatives of other class members. (*Eggert, supra, 20 Cal.2d at p. 201.*)

Third, under the "American" rule, each party must bear their own attorney's fees accrued during litigation unless such an award is authorized by statute or agreement. (*Essex Ins. Co. v. Five Star Dye House, Inc. (2006) 38 Cal.4th 1252, 1257.*) In following with the "American" rule, "Objectors are not ordinarily entitled to an attorney fees award." (Weil & Brown, Cal. Prac. Guide: Civil Procedure Before Trial (The Rutter Group 2006) P 14:146.5, p. 14-85.)

There are two exceptions. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) P P 14:146.5 -14.146.9, pp. 14-85-14-86.)

The first exception is the common fund or substantial benefit doctrine. But this theory would be futile here, because common fund fee awards "*are not assessed directly against the losing party* (fee shifting), but come [*14] out of the fund established by the litigation, so that the beneficiaries of the litigation, *not the defendant*, bear this cost (fee spreading)." (*Lealao v. Beneficial California, Inc. (2000) 82 Cal.App.4th 19, 27*, italics added.) In this appeal, however, the "appellants" seeks fees to be paid by Kia directly, not fees from a common fund established on behalf of Kia buyers. (The fact that this is not a "common fund" or "substantial benefit" case may be illustrated by comparing this case with *Lealao*. There, while the settlement did not require counsel fees to be deducted from funds received by members of the class or otherwise specify the amount of fees counsel were to receive, it *did* provide that the defendant would pay class counsel "'such reasonable attorneys' fees and costs as determined by the Court.'" (*Id. at p. 23.*) Here, by contrast, Kia has never *agreed* to pay *any* fees to Lieff & Cabraser. Kia has only acknowledged, in the notice, the fact that Lieff & Cabraser would unilaterally be making a claim for fees.)

Second, there is the private attorney general theory (see *section 1021.5 of the Code of Civil Procedure*), where the class member may have taken action that enforced an important [*15] right affecting the public interest. However, the attorney general theory, as this court explained in detail in *Hammond v. Agran (2002) 99 Cal.App.4th 115, 121-128*, requires a "party" seeking attorney fees to "transcend" his or her own narrow personal interests (both financial and non-financial). As we explained in *Hammond*: "The claimant's objective in the litigation must go beyond -- 'transcend' -- those things that concretely, specifically and significantly affect the litigant . . . to affect the broader world or 'general public' as the statute puts it." (*Id. at p. 127.*) But this is a class action. By definition it only affects the concrete financial interests of the substituted class members whose concern is repair of their own allegedly faulty brake systems, not a right affecting the public (like the right of all political candidates to express their own views on issues, as was the case in *Hammond*).

Finally, substitution would only be a sham anyway. It would only mean that attorneys who now represent themselves as appellants arguing that the trial court abused its discretion in not awarding them fees, would, instead, represent five straw plaintiffs as appellants, and would still [*16] be arguing that the trial court abused its discretion in not awarding the attorneys fees. Substitution would only mean *more* distance between the ostensible "appellants" and anyone who was actually aggrieved by the challenged order, since the five straw plaintiffs would have nothing to gain by remanding the case to provide for an award of fees to Lieff & Cabraser. [7]

7 Indeed, the five straw plaintiffs might have something to lose: To the degree that Kia has committed x dollars to settle the various brake claims on a 50-state basis, any extra funds spent by Kia on attorneys in the 47-state California settlement would make Kia less willing to pay money to consumers in any remaining actions.

III. DISPOSITION

The appeal brought by Lieff & Cabraser is dismissed. The request to substitute non-party class members represented by Lieff & Cabraser in their stead is denied.

Respondent shall recover its costs on appeal.

SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.

O'LEARY, J.

JENNIFER-JOY BRONK, Objector and Appellant, v. JON TALARICO, Plaintiff and Respondent; VISTAPRINT USA, Incorporated, etc. et al., Defendants and Respondents.

B185400

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

2007 Cal. App. Unpub. LEXIS 1540

February 28, 2007, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: APPEAL from an order of the Superior Court of Los Angeles County, No. BC321402. Susan Bryant-Deason, Judge.

DISPOSITION: Affirmed.

COUNSEL: Prindle, Decker & Amaro, William M. Hake and James V. Joyce; Wilmer, Cutler, Pickering, Hale and Dorr, Richard A. Johnston and Shane T. Stansbury for Defendants and Respondents.

Kendrick & Nutley, J. Garrett Kendrick and C. Benjamin Nutley for Objector and Appellant.

Schreiber & Schreiber, Inc., Edwin C. Schreiber and Eric A. Schreiber; The Brannan Law Offices and G. Bryan Brannan for Plaintiff and Respondent.

JUDGES: ALDRICH, J.; KLEIN, P.J., KITCHING, J. concurred.

OPINION BY: ALDRICH

OPINION

INTRODUCTION

Appellant and objector, Jennifer-Joy Bronk, appeals from the order of the trial court that gave final approval to the settlement of a class action lawsuit brought by plaintiff Jon Talarico against defendant VistaPrint USA, Incorporated, [*2] a subsidiary of VistaPrint Limited (VistaPrint). The complaint alleged that VistaPrint engaged in unlawful advertising (*Bus. & Prof. Code, § 17537* [1]) and unfair and deceptive business practices (§ 17200) in its internet offer for free business cards. We discern no abuse of discretion. Accordingly, the order is affirmed.

1 All further statutory references are to the Business and Professions Code unless otherwise noted.

FACTUAL AND PROCEDRUAL BACKGROUND

1. *The class action*

Talarico ordered "250 free business cards" from a website run by VistaPrint, a Delaware corporation. To obtain these "free" cards, Talarico had to select and pay a "shipping and handling fee" ranging from $ 4.99 to $ 24.99, depending on the speed of delivery. Talarico selected the 21-day shipping option and was billed $ 4.99. When he received the box a few weeks later, he noted that VistaPrint had paid approximately 76 cents in postage.

Talarico filed a class action suit against VistaPrint on behalf of [*3] California customers who ordered "free" business cards from VistaPrint and paid "excessive" shipping and handling fees. The complaint alleged

that VistaPrint violated *section 17537, subdivisions (a) through (c)*, which prohibit the making of offers for goods or services as "prizes," "gifts," or other similar term, where the offeree is required to pay a "handling charge" that, among other things, either exceeds the actual cost of handling, or 80 percent of the actual cost of the item, to the offeror. [2] The complaint alleged that the cost to send the cards by United States Postal Priority mail was $ 3.85, and the cost to VistaPrint to send the box to Talarico was 76 cents, with the result that the handling charge had been unrelated to, and far in excess of, VistaPrint's actual cost of shipping and handling. The complaint also alleged that by charging excessive and illegal shipping and handling fees, VistaPrint violated the Unfair Competition Law (§ 17200).

2 *Section 17537* states in pertinent part:

"(a) It is unlawful for any person to use the term 'prize' or 'gift' or other similar term in any manner that would be untrue or misleading, including, but not limited to, the manner made unlawful in subdivision (b) or (c). . . . [P]

"(c) It is unlawful to notify any person by any means that he or she will receive a gift and that as a condition of receiving the gift he or she must pay any money, or purchase or lease (including rent) any goods or services, if any one or more of the following conditions exist: . . . .[P]

"(2) The handling charge (A) is not reasonable, or (B) exceeds the actual cost of handling, or (C) exceeds the greater of three dollars ($ 3) in any transaction or 80 percent of the actual cost of the gift item to the offeror or its agent, or (D) in the case of a general merchandise retailer, exceeds the actual amount for handling paid to an independent fulfillment house or supplier, either of which is in the business of handling goods for businesses other than the offeror of the gift."

[*4] 2. *The settlement*

After months of negotiations, the parties reached a settlement and moved the trial court in April 2005 for preliminary approval of the agreement and certification of the class. Under the settlement, the parties agreed that (1) VistaPrint would change the wording on its website from " 'shipping and handling' " to " 'shipping and processing;' " (2) class members would receive one coupon or promotional code entitling each of them, when ordering 250 or more "free" business cards, to receive 250 additional business cards at a discounted rate according to a table set forth in the settlement agreement; (3) Talarico, as class representative, would receive the sum of $ 2,500; and (4) VistaPrint would pay the cost of notice and distribution of class-member benefits. The settlement also included a release of all accrued claims against VistaPrint and provided that VistaPrint would pay attorneys' fees and costs up to a maximum of $ 115,808 to plaintiffs' counsel.

In connection with the motion for preliminary approval of the class-wide settlement, the parties explained that they believed the settlement was fair for several reasons. The changes to VistaPrint's website would [*5] prevent confusion among customers and avert future litigation by customers about VistaPrint's charges. The settlement would compensate each class member in an amount that was proportionate to the alleged harm suffered while eliminating the risks and costs to the class associated with pursuing litigation. Also, the settlement would obviate VistaPrint's threatened motion to dismiss based on a choice of law clause requiring disputes be litigated in Bermuda, under Bermuda law, which lacks a shipping and handling statute similar to California's *section 17537*.

At the hearing, the court noted several problems with the settlement: (1) the proposed notice to the class was not attached to the motion; (2) there was no declaration from Talarico explaining why he should be the designated class representative; and (3) there was no one designated to administer the settlement for the class.

Counsel responded that plaintiff would monitor VistaPrint's administration of the settlement as follows: Because VistaPrint conducted the challenged promotional program solely on the internet, VistaPrint would notify by e-mail all those who had originally obtained cards. Plaintiff would make a random selection [*6] of 100 members from VistaPrint's electronic database, estimated at 396,000-member class, to verify that notice had been properly sent. Talarico's counsel also offered to submit a declaration on behalf of his client attesting to his propriety as a class member. The court ultimately decided that a declaration was unnecessary, stating, "If you all have settled that issue, well, then, you know, I'm all right with that. Because I don't think that there's - without having, you know, class certification hearing, which we're clearly not going to be having based on the settlement, you know, then you've agreed, and so that's okay." Talarico's attorneys agreed to provide a copy of the notice to the trial court so that it could sign the order. VistaPrint represented that it would verify that notice had been sent. For purposes of settlement only, the court conditionally certified the class as "All persons with California addresses who, between September 12, 2000 and the date of entry of the Preliminary Order, ordered and received 250 free business cards from the website []vistaprint.com or any internationalized version of that website."

The court then gave preliminary approval of the settlement [*7] agreement and *conditionally* certified the class, representative, and the notice. The court set June 17, 2005, as the date for the hearing to consider the fairness, reasonableness, and adequacy of the agreement to the members of the settlement class; to grant final approval of the agreement and dismissal of the class action; to provide class members with the opportunity to object to the settlement agreement; and consider any other matters the court might deem necessary.

3. *The notice*

VistaPrint sent notice by e-mail to 421,754 class members on May 2, 2005, informing them of the proposed settlement. In the declaration attesting to the mailing filed with the court, VistaPrint's Vice President and General Counsel explained that the text of the e-mail was the one approved by the court at the preliminary hearing. However, shortly after the initial e-mail was sent, plaintiff's attorney advised VistaPrint's counsel that the address listed for plaintiff's counsel contained a typographical error. Further, "VistaPrint subsequently discovered an additional error in the notice." Apparently, that "additional error" was the omission of two paragraphs of the notice that set forth the requirements [*8] to perfect an objection to the settlement.

Later that same day, VistaPrint sent a corrected notice by a second e-mail addressed to the same class members. That correction contained a preamble: " 'The notice previously sent to you contained an error, which has been corrected in the notice below. Please disregard the prior notice. We apologize for any confusion!' " In pertinent part, the revised notice added the two previously-omitted paragraphs under the heading "WHAT YOU CAN DO," that set forth the requirement that objectors provide a statement under penalty of perjury that they were members of the class. [3]

> 3 The pertinent part of the revised paragraphs read: "provided that you have, by June 6, 2005, filed with the Court a written notice of your intention to appear, all supporting papers, and *a statement under penalty of perjury that you are in fact a member of the Settlement Class, and have served such notice and papers upon counsel for Plaintiff and counsel for Defendant at the following addresses*: . . . To be considered, the notice and papers must be received by the Court and delivered or postmarked to Plaintiff's counsel and Defendant's counsel no later than June 6, 2005. CLASS MEMBERS WHO DO NOT TIMELY MAKE THEIR OBJECTIONS *IN THIS MANNER* WILL BE DEEMED TO HAVE WAIVED ALL OBJECTIONS AND SHALL NOT BE ENTITLED TO BE HEARD AT THE SETTLEMENT APPROVAL HEARING." (Italics added, emphasis in original.)

[*9] Four days before the final approval hearing, class counsel moved for $ 115,808 in attorney fees.

4. *Bronk's objections*

In response to the notice to 421,754 class members, 212 members opted out of the class. Four people, including Bronk filed objections to the settlement.

Bronk objected on several grounds. First, she argued that the proposed settlement did not benefit the class or the general public because the injunctive relief would not cure the alleged violations, but would instead permit VistaPrint to continue its conduct unabated, with the imprimatur of the court. She asserted that the mere renaming of the practice from " 'shipping and handling' " to " 'shipping and processing' " would not alter the practice and the law prohibits the *practice* itself, *not the label* " 'handling.' " Second, Bronk challenged the proposed coupon relief for the class members, observing that VistaPrint had raised the handling or "processing" charge from $ 4.99 to $ 5.25, which would cause class members to pay more to take advantage of the settlement. Third, Bronk objected to the $ 2,500 incentive award to class-representative Talarico, arguing that the award raised questions about the [*10] adequacy of his representation. She noted that Talarico's signature did not appear on the settlement agreement filed with the court. Finally, Bronk objected to class counsel's attempt to defer the fee hearing until after final approval.

VistaPrint responded to some of Bronk's objections in its memorandum in support of final approval of the class action settlement. VistaPrint explained that the language change on its website from " 'shipping and handling' " to " 'shipping and processing' " would clarify that the fee charged to receive the "free 250 business cards includes more than the costs of shipping . . . ." and thus avoid conflicting with the restrictions on handling charges contained in *section 17537, subdivision (c)*. VistaPrint also promised to identify on the website "the various costs associated with processing the business cards and the order for the business cards, such as expenses and costs payable to third parties related to the handling and processing of customer orders and transactions, internal handling and processing charges incurred directly by VistaPrint, transaction fees charged by third party payment processing firms and other expenses incurred by VistaPrint with [*11] respect to customer orders." In a declaration filed in support of the settlement approval, VistaPrint's counsel responded to Bronk's objection that VistaPrint had raised its charge for 250 business cards from $ 4.99 to $ 5.25, explaining that the ben-

efit to the class members of the proposed settlement would remain unchanged.

5. *The final approval*

At the fairness hearing, Talarico questioned Bronk's standing to appear. The court expressed doubt about Bronk's standing, noting that Bronk had not filed the requisite declaration attesting to her membership in the class. Bronk's attorney explained that the omission resulted from the fact that the class notice that Bronk had provided her attorney was the initial defective notice, which omitted the declaration requirement. Still, counsel offered to provide a declaration for the court. In the end, the court considered Bronk's objections.

The trial court found the settlement to be fair and provided the class with benefits, explaining its interpretation of *section 17537* was that the statute was concerned that costs not be hidden, that companies should " 'Say it up front.' " The court distinguished between administrative costs and the costs [*12] of card stock or ink. "If you're talking about supplies, then, at that point, it's not free. That's what I'm concerned about here. I want some sort of wording which is going to make it clear to the person who makes the purchase what it is that is free." The court believed that telling customers exactly what is free contributed to the settlement's fairness because "the wording shows exactly what the Statute wants, and it . . . also resolves issues which were brought up by objectors . . . ."

As the court wanted to see the actual changes to the wording on VistaPrint's website before signing the settlement to assure itself that VistaPrint would tell customers "what these costs are," the parties and court revised the settlement's description of "processing" fees. The court approved the following language: "Processing fees include the various costs associated with processing your product and your order, such as costs and expenses related to acquiring and processing your order, including costs and expenses payable to third parties for acquiring and processing of customer orders and transactions, internal processing charges incurred directly by VistaPrint, transaction fees charged by third [*13] party payment processing firms, and other expenses incurred by VistaPrint with respect to customer orders. Processing does NOT include any charges for product itself, including cost related to raw materials or manufacturing of the product." This language was added as exhibit B to the settlement agreement and incorporated into the judgment as an injunction as required by the trial court.

The order of final approval of the settlement and certification of the class for settlement purposes only was filed on June 17, 2005. The court also ordered VistaPrint to file a declaration confirming that it had commenced the discount program, and to report in January 2006, the number of class members who had redeemed the discount offer.

In August 2005, Bronk's counsel filed Bronk's declaration attesting to her membership in the class. The declaration also attached a copy of the text of the initial, defective class notice that omitted reference to the declaration requirement. That same day, Bronk filed her timely notice of appeal.

CONTENTIONS

Bronk contends that the trial court erred in approving the settlement and certifying the class. Talarico and VistaPrint contend that Bronk has no standing [*14] and the approval was not an abuse of discretion.

DISCUSSION

I. *Bronk has standing*

Talarico and VistaPrint contend that Bronk had no standing to appear either below or on appeal. Talarico argues that Bronk's declaration attesting to her membership in the class was not filed until two months after the judgment had been entered.

Bronk filed objections in a timely manner. The omission of her declaration attesting to her membership in the class does not affect her standing. "Objections which have been brought to the attention of the court and of counsel for proponents of a settlement by counsel for objectors should not be disregarded simply because they do not precisely comply with the procedures for the filing of individual objections specified in the notice of settlement." (*Weinberger v. Kendrick (2d Cir. 1982) 698 F.2d 61, 69, fn. 10*, cert. den. *(1983) 464 U.S. 818, 78 L. Ed. 2d 89*, citing 3 Newberg, Class Actions (1977) § 5660d.) In *Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224* (*Wershba*), standing was not undermined where notice to the putative class did not clearly inform members that objectors must submit documentary [*15] proof of class membership and the objector in any event filed attached documents that adequately indicated the objector's membership in the class. (*Id. at pp. 235-236.*)

Here, the original class notice omitted the two paragraphs delineating the entire procedure for objecting and did not clearly inform the members of the obligation to file a declaration. Although that notice was corrected, similar to *Wershba*, because VistaPrint conducted the challenged promotion solely on the internet, it could notify by e-mail all those who had originally obtained cards. Bronk received that e-mail and so she necessarily fell within the class. (*Wershba, supra, 91 Cal.App.4th at p. 236.*) Furthermore, as in *Wershba*, Bronk appeared through her attorney at the fairness hearing where she

addressed the issues of her failure to file the declaration and of her standing to object to the settlement. The court considered her objections and thus impliedly found her failure to file a declaration did not preclude a hearing of her objections. (*Id. at pp. 235-236.*) Finally, Bronk's attorney promised the court he would provide Bronk's declaration when [*16] he received it. Counsel's declaration attaching Bronk's declaration, filed with the court after judgment, was simply an endeavor to comply with that promise. With respect to her standing on appeal, "[c]lass members who appear at a final fairness hearing and object to the proposed settlement have standing to appeal." (*Id. at p. 235.*) For these reasons, we conclude that Bronk clearly had standing to object below and to appeal. [4]

> 4 We deny Talarico's motion to strike. Specifically, Talarico sought to strike from the appellate record Bronk's attorney's declaration attaching Bronk's declaration attesting to her membership in the class (the "Notice of Filing Declaration of Jennifer-Joy Bronk and Notice from VistaPrint"). Talarico argues that the notice and attorney declaration were signed 59 days, and Bronk's declaration was signed 10 days, *after* the court entered judgment. Talarico and VistaPrint argue that inasmuch as these documents were filed after the judgment, they are not part of the record and may not be considered by this court. Normally, we are confined to review of the proceedings that occurred before the trial court. (9 Witkin, Cal. Procedure (4th ed. 1997) § 328, pp. 369-370.) However, the question of Bronk's standing was raised and argued before the trial court, which decided to hear her objections. Therefore, the promised declaration, although filed after the judgment was entered, only confirmed the ruling allowing Bronk to air her objections.
>
> Furthermore, there is no question that as a member of the class, Bronk was aggrieved as defined in *Code of Civil Procedure section 902 (van't Rood v. County of Santa Clara (2003) 113 Cal.App.4th 549, 560)* with the result she has standing to appeal and has not "waived" her objections, VistaPrint's and Talarico's contentions to the contrary notwithstanding.

[*17] II. *The settlement is fair and not an abuse of discretion*

a. *Standard of review*

" ' " '[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action requires court approval.' " ' [Citations.] The court must determine the settlement is fair, adequate, and reasonable. [Citations.] The purpose of the requirement is 'the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties.' [Citation.]" (*Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1800-1801 (Dunk)*, fn. omitted; accord *Staton v. Boeing Co. (9th Cir. 2003) 327 F.3d 938, 960* [court review of class action settlements "includes not only consideration of whether there was *actual* fraud, overreaching or collusion but, as well, substantive consideration of whether the terms of the decree are 'fair, reasonable and adequate to all concerned.' [Citation.]".)

"The trial court has broad discretion to determine whether the settlement is fair. [Citation.] It should consider relevant factors, such as [1] the strength of plaintiffs' case, [2] the [*18] risk, expense, complexity and likely duration of further litigation, [3] the risk of maintaining class action status through trial, [4] the amount offered in settlement, [5] the extent of discovery completed and the stage of the proceedings, [6] the experience and views of counsel, [7] the presence of a governmental participant, and [8] the reaction of the class members to the proposed settlement. [Citation.] The list of factors is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between the parties. The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.' [Citation.] 'Ultimately, the [trial] court's determination is nothing more than "an amalgam of delicate balancing, gross approximations and rough justice." [Citation.]' [Citation.]" (*Dunk, supra, 48 Cal.App.4th at p. 1801.*)

" 'Our task on appeal *is a very limited one*' . . . . ' [*19] "The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." [Citation.] We are not permitted to "substitute our notions of fairness for those of the district judge and the parties to the agreement." ' [Citation.] . . . . [P] Great weight is accorded the trial judge's views. The trial judge ' "is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." ' [Citations.] *To merit reversal, both an abuse of discretion by the trial court must be 'clear' and the demonstration of it on appeal 'strong.'* [Citations.]" (*7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1145-1146*, italics added.)

b. *The Dunk factors justify approval of the settlement*

Turning to the first two factors relevant to this case listed in *Dunk*, the court read the papers and heard argument about the strength of plaintiffs' case. Major legal issues were in dispute. For example, the question of the retroactivity of proposition [*20] 64 had not yet been resolved at the time the parties negotiated the settlement. *Californians for Disability Rights v. Mervyn's LLC (2006) 39 Cal.4th 223* resolving this issue was not decided until July 2006. Also, the court understood that there was no definition either in *section 17537* or in case law of "handling." By comparison, it was aware of the forum selection clause on the website and VistaPrint's threat to remove this case to Bermuda, which does not have a legal equivalent of *section 17537*. The trial court was also aware of the miniscule amount of damage to each class member compared to the large costs incurred by the time of the hearings. By settling, the class avoided the risk and huge expense compared to relatively small amount of recovery involved to individual plaintiffs, even if the case remained in California as opposed to Bermuda.

It is not at all as obvious as Bronk suggests that the forum selection clause would not have been honored in this case. On the one hand, " '[A]n agreement designating [a foreign] law will not be given effect if it would violate a strong California public policy . . . [or] "result in an evasion of . . . a statute of the [*21] forum protecting its citizens." ' [Citation.]" (*Hall v. Superior Court (1983) 150 Cal.App.3d 411, 417, 197 Cal. Rptr. 757.*) "If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy." (*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal.4th 459, 466*, fn. omitted.) On the other hand, "choice of law provisions are usually respected by California courts. [Citations.]" (*Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal.3d 491, 494, 131 Cal. Rptr. 374.*) "Both the United States Supreme Court and the California Supreme Court have recognized that '[f]orum selection clauses play an important role in both national and interstate commerce.' [Citations.] . . . California courts routinely enforce forum selection clauses even where the chosen forum is far from the plaintiff's residence. [Citations.]" (*Net2Phone, Inc. v. Superior Court (2003) 109 Cal.App.4th 583, 587-588.*) "When a forum selection clause appears in 'a contract entered [*22] into freely and voluntarily by parties who have negotiated at arm's length, . . . forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable.' [Citation.]" (*Id. at p. 588.*) This is true where the forum selection clause is set forth on a website, "a common practice in Internet business." (*Ibid.*) [5] Here, the court explicitly weighed these enumerated concerns. Moreover, even had the forum selection clause been unenforceable, as Bronk contends, Talarico and the class would have had to expend time and money simply to oppose VistaPrint's motion to enforce it. Therefore, our review of the record here reveals that the case presented numerous complex issues, and while plaintiffs might have had a strong case, without settlement, they faced further, expensive litigation with no guarantee of a favorable result.

> 5 In any event, Bronk's reliance on *Aral v. Earthlink, Inc. (2005) 134 Cal.App.4th 544* is unavailing as that case was decided after the trial court here had granted final approval of the settlement agreement. Where *Aral* had no bearing on the strength of plaintiffs' case here, it is irrelevant to whether the court abused its discretion in approving the settlement.

[*23] As for the amount offered in settlement, the fourth *Dunk* factor, the benefit to the class here from the settlement is at minimum commensurate with the harm suffered by plaintiffs. California courts have approved settlements that provided for coupons toward the purchase of the defendants' products. (*Wershba, supra, 91 Cal.App.4th at pp. 246-247*; *Dunk, supra, 48 Cal.App.4th at p. 1804.*) And, the benefit to the class of this settlement included more than merely the coupons; it also included changes to the language on VistaPrint's website, and the fact that VistaPrint would bear the costs of notice and distribution of the class benefits. (See, e.g., *Wershba, supra, at p. 247* [coupons were part of the settlement that also included changing policy that led to lawsuit].)

Bronk argues that during the course of settlement discussions, VistaPrint had increased its fees for the business cards with the result that the estimate of total benefit to the class should have been reduced. We disagree. The increase in price for business cards only increased the value of the coupons to the class recipients. In any event, "[a]s to the value of [*24] the coupons, the proponents of the settlement were not required to prove their value." (*Wershba, supra, 91 Cal.App.4th at p. 247*, citing *Dunk, supra, 48 Cal.App.4th at p. 1804.*) We note only that the alleged damage suffered by each plaintiff is slight. A recovery this small would not warrant the time and expense of litigation on an individual basis. Under the settlement, irrespective of the delivery option chosen, each class member would realize a saving of more than 50 percent. The benefit increases for faster delivery choices, and is, hence, proportional to the very small amount of harm alleged to have been suffered by each plaintiff. Certainly, the trial court did not abuse its discretion in finding that the class members would recover more in the settlement than they might at trial.

(*Dunk, supra, 48 Cal.App.4th at p. 1801.*) This confirms the trial court's fair, reasonable, and adequate finding.

The remaining factors were also considered by the trial court. The record shows that the parties reached this settlement through discovery and arm's-length negotiations that occurred over the course of months. The parties required the [*25] assistance of a mediator to reach an agreement on what constituted reasonable attorney's fees, thus belying any suggestion that the fee amount was the result of collusion. Bronk cannot reasonably question the experience of counsel in this case. Only a miniscule percentage of the class objected or opted out of the lawsuit, *and only one class member participated in this appeal.* Finally, the court heard details about the parties' efforts, was aware of the multiple pleadings filed, and heard extensive oral argument before approving the settlement. Given that the court properly considered the *Dunk* factors and found the settlement to be fair, reasonable, and adequate, we perceive no abuse of discretion.

Bronk nonetheless challenges the injunctive relief portion of the settlement, contending that the revised language to VistaPrint's website impermissibly permits VistaPrint to evade the strictures of *section 17537* because it merely changes the name of the offending conduct from "handling" to "processing."

We reject this contention. Bronk has not shown that the injunction language is unlawful or illegal. She has not explained what part of the $ 4.99 charge constitutes a "handling [*26] charge" under the settlement and that that amount contravenes *section 17537, subdivision (c)(2)* as "not reasonable" or "exceed[ing] the greater of three dollars ($ 3) in any transaction or 80 percent of the actual cost of the gift item to" VistaPrint. The evidence before the trial court was disputed and unclear. VistaPrint submitted the unchallenged declaration of its general counsel who stated that the $ 4.99 charge for shipping, processing, and handling was less than half of the $ 10.04 cost to VistaPrint to ship, handle, and process those cards. Bronk counters that the declaration only shows that shipping, handling, *and processing* costs VistaPrint more than shipping and handling. We may not weigh evidence to resolve what dollar amount is attributable to "handling" here. Bronk has not shown what the cost is to VistaPrint to "handle" 250 cards, or that the amount charged as handling actually exceeds the limits allowed as handling in *section 17537, subdivision (c).*

More important, a resolution of these such issues requires determination in the first instance of what constitutes "handling" under the statute. However, courts deciding whether to approve a proposed class-action [*27] compromise "*do not decide the merits of a case or resolve unsettled legal questions.*" (*Carson v. American Brands, Inc. (1981) 450 U.S. 79, 88, fn. 14, 67 L. Ed. 2d 59*, italics added; accord, 4 Conte & Newberg, Newberg on Class Actions (4th ed. 2002) § 11:41, p. 92.) We may not review the substantive merits of the settlement agreement but only whether the trial court abused its discretion in finding the settlement to be fair, adequate, and reasonable to the settling parties. (*Dunk, supra, 48 Cal.App.4th 1800-1801*; accord *7-Eleven Owners for Fair Franchising v. Southland Corp., supra, 85 Cal.App.4th at pp. 1144-1145.*) " '[T]he merits of the underlying class claims are not a basis for upsetting the settlement of a class action.' [Citations.] The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial. [Citation.]" (*Wershba, supra, 91 Cal.App.4th at p. 246.*) We are expressly directed not to " 'reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, [*28] for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.' [Citation.] In other words, '*the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits.*' [Citation.]" (*7-Eleven Owners for Fair Franchising v. Southland Corp., supra, at pp. 1145-1146*, italics added.) As VistaPrint observes, the unresolved nature of the meaning of "handling" in *section 17537* alone puts the strength of plaintiffs' case in question, which in turn further justifies approval of settlement.

The trial court gave its approval to a settlement agreement between private parties. (*Dunk, supra, 48 Cal.App.4th at p. 1801.*) The court found that the agreement was fair to the class because "the wording shows exactly what the Statute wants, and it . . . also resolves issues which were brought up by objectors." The statute makes it unlawful to suggest that an item is a gift, a prize, or free "in any manner that would be untrue or misleading" in ways defined by the statute, including charging unreasonable or excessive handling fees. (*§ 17537*, subd. [*29] (a).) Insofar as the settlement itemizes for customers what they are paying for and what they are receiving for free when they pay $ 5.25 to VistaPrint for the 250 business cards, it is not misleading. (Cf. *People v. Columbia Research Corp. (1977) 71 Cal.App.3d 607, 139 Cal. Rptr. 517* [affirming preliminary injunction precluding defendant from offering promotion where offer was significantly misleading].) The change in wording on the website via the settlement agreement explains in a truthful manner what the shipping and processing fees actually are so that customers will not be misled. Accordingly, the trial court reasonably found that the changes to VistaPrint's website's wording was fair and reasonable, thus disposing of Bronk's contention that the terms of the injunction were unlawful and contrary to the statute. Ultimately, the only

people upon whom this agreement has collateral estoppel effect are VistaPrint and the members of the class who received notice and did not opt out of the settlement. Because the *Dunk* factors overwhelmingly militate in favor of a finding that the settlement was fair, reasonable, and adequate, the trial court did not abuse its [*30] discretion in approving it.

III. *The trial court did not err in certifying the class*

Bronk contends that issues of due process and adequacy of representation precluded certification of this class action. [6] She argues that the court erred in awarding $ 2,500 to Talarico who was absent from the case and where the class members received only modest benefits from the settlement.

> 6 Bronk contends that the notice to putative class members was deficient because it omitted the requirement that class members must demonstrate membership. However, the omission was rectified by a second notice sent the same day. Also, it appears that only Bronk suffered from failing to receive that notice, and the court not only rejected VistaPrint's challenge to her standing on that basis, but considered her objections in any event. Hence, Bronk was not harmed by it.

a. A*dequacy of representation*

Bronk observes that Talarico never demonstrated typicality or adequacy of representation, or even membership in the class. Rather, [*31] the court allowed the parties to stipulate to Talarico's typicality and adequacy, which Bronk claims is not contemplated by legal authority.

"The requirements for class certification are well established: there must be questions of law or fact common to the class that are substantially similar and predominate over the questions affecting the individual members; the claims of the representatives must be typical of the claims or defenses of the class; and the class representatives must be able to fairly and adequately protect the interests of the class. [Citation.]" (*Wershba, supra, 91 Cal.App.4th at p. 238*; accord, *Dunk, supra, 48 Cal.App.4th at p. 1806 & Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 470, 174 Cal. Rptr. 515.*) Thus, the representative plaintiff must be a member of the class, at least at the time the action is commenced (*Anthony v. General Motors Corp. (1973) 33 Cal.App.3d 699, 704, 109 Cal. Rptr. 254*), and adequately and fairly represent and protect the interests of the class. (*Richmond v. Dart Industries, Inc., supra.*) The party seeking class certification carries the [*32] burden to prove that the named representative can fairly and adequately represent and protect the class interests. (*Ibid.*)

Here, the trial court noted that Talarico had not appeared or filed a declaration attesting to his typicality and adequacy of representation. However, the court had the complaint that alleges how Talarico visited VistaPrint's website, received the offer, and paid the shipping and handling fees for his purchase. It also had the declaration of Edwin C. Schreiber which stated that Talarico had purchased business cards from VistaPrint, provided significant services and was helpful in prosecution and resolution of the class action. Bronk did not object to this declaration in the trial court or otherwise contradict it. Hence, the declaration is competent, credible evidence of Talarico's membership in the class at the commencement of the lawsuit and his typicality throughout. Finally, the court heard the stipulation of the parties at the hearings that Talarico adequately and typically represented the class. (*Wershba, supra, 91 Cal.App.4th at p. 238.*) The trial court did not err in finding that VistaPrint and Talarico had demonstrated Talarico's representation.

[*33] Bronk argues the settlement's $ 2,500 incentive payment to Talarico undermined his adequacy as class representative. " 'The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent.' [Citation.] ' "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." [Citations.] To assure "adequate" representation, the class representative's personal claim *must not be inconsistent with the claims of other members of the class.* [Citation.]' [Citation.]" (*J. P. Morgan & Co., Inc. v. Superior Court (2003) 113 Cal.App.4th 195, 212*, italics added.) "Where there is a conflict that goes to the ' "very subject matter of the litigation," ' it will defeat a party's claim of class representative status." (*Ibid.*, quoting from *Richmond v. Dart Industries, Inc., supra, 29 Cal.3d at p. 470.*) There is nothing about a small incentive award to the class representative that necessarily undermines Talarico's adequacy as a representative. (See, *Staton v. Boeing Co., supra, 327 F.3d at pp. 976-977.*)

Bronk's [*34] reliance on *Staton v. Boeing Co., supra, 327 F.3d 938* is unavailing. *Staton* disliked the incentive awards in the settlement presented there because of the size of the payments in proportion to the settlement amount and the size of each payment, beginning at $ 50,000 with an average of more than $ 30,000 per plaintiff. These awards called into question the incentive of the plaintiffs to settle to the detriment of the class as a whole. (*Id. at pp. 976-977.*) An additional important reason that the incentive award in *Staton* was disapproved was that it went to a large group of class members and not just to the class representatives who "were not essential to the litigation . . . ." (*Id. at p. 976.*)

The $ 2,500 award to Talarico alone distinguishes this case from *Staton*. The $ 2,500 incentive payment

here by comparison to the size of the awards in *Staton*, is indeed small and constitutes a tiny percentage of the $ 1 million award paid by VistaPrint. Otherwise, *Staton* recognized that the Ninth Circuit has "approved incentive awards of $ 5,000 each to the two class representatives of 5,400 potential class members in a settlement [*35] of $ 1.725 million. [Citations.]" (*Staton v. Boeing Co., supra, 327 F.3d at p. 976.*) The trial court did not err in approving this incentive award to Talarico.

Next, Bronk lists omissions that, she argues, generally undermine the adequacy of Talarico's representation. The contention is unpersuasive. Talarico did provide oversight, Bronk's contention to the contrary notwithstanding. The entire settlement, especially the benefits to the class members, was negotiated before the parties discussed attorney fees and the fee issue was referred to a mediator. Further, it was Talarico's counsel who noticed the defect in the original notice and that defect was brought to the court's attention. The fact that VistaPrint had increased its charges during the settlement negotiations did not alter the result and was not so relevant as Bronk would have it. Hence, Talarico's failure to independently notify the trial court of that fact does not diminish his adequacy as class representative. In short, Bronk failed to raise a conflict between Talarico and the interests of the class, let alone one that goes to the very subject matter of the litigation. [7]

> 7 Bronk argues Talarico's representation is called into doubt because he did not sign a declaration or the settlement, whereas objectors were required to file a declaration attesting to their membership in the class. Talarico's membership was clear from the commencement of the lawsuit, whereas without a declaration, anyone unrelated to the lawsuit could have had an objection heard. Necessarily, objectors' status could only be ascertained by filing declarations demonstrating that they met the class criteria. Certainly, the requirement that objectors demonstrate their membership in the class by filing a declaration under penalty of perjury does not undermine the adequacy of Talarico's representation, Bronk's insistence to the contrary notwithstanding.

[*36] b. *Attorney fees*

Bronk contends that the revised notice did not disclose the amount of attorney fees plaintiff's counsel and VistaPrint had agreed upon. She also argues that the court erred in calculating the attorney fees awarded.

"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. [Citation.]" (*Wershba, supra, 91 Cal.App.4th at p. 255.*)

Contrary to Bronk's contention, the class was notified about the attorney fees. Four objectors challenged the fees. In any event, the amount of fees and costs did not affect the class-member benefit.

Turning to Bronk's challenges to the amount of the attorney fee award, the parties submitted the fee issue to a mediator, who functioned as an "independent third party" and who confirmed "that the fee was not the result of collusion or a sacrifice of the interests of the class." (*Hanlon v. Chrysler Corporation (9th Cir. 1998) 150 F.3d 1011, 1029.*) Further, Talarico's counsel submitted an extensive declaration demonstrating the reasonable hourly rate for the attorneys' services and establishing [*37] the number of hours spent working on the case. "California case law permits fee awards in the absence of detailed time sheets. [Citations.] An experienced trial judge is in a position to assess the value of the professional services rendered in his or her court. [Citation.]" (*Wershba, supra, 91 Cal.App.4th at p. 255.*) The parties employed a lodestar of 1.2 percent of the hourly legal fees incurred. This percentage was not excessive, especially where lodestars can range from 2 to 4 percent. (*Ibid.*) Although "[n]o specific findings reflecting the court's calculations were required [citation]" (*Id. at p. 254*), the court's order here fully set out its reasoning. We find no abuse of discretion on this record.

Talarico has moved this court to impose sanctions against Bronk for filing a frivolous appeal. (*Cal. Rules of Court, rule 8.276(e)* (formerly, rule 27(e)); *In re Marriage of Flaherty (1982) 31 Cal.3d 637, 650, 183 Cal. Rptr. 508.*) The motion is denied.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondents.

ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.

FELIX YIP et al., Plaintiffs, v. SAMUEL K. ZIA et al., Defendants and Respondents; CHI LAM et al., Objectors and Appellants. THOMAS LAM et al., Plaintiffs, v. SAMUEL K. ZIA et al., Defendants and Respondents; CHI LAM et al., Objectors and Appellants.

B188228

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

2007 Cal. App. Unpub. LEXIS 3243

April 24, 2007, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: APPEALS from an order of the Superior Court of Los Angeles County, Nos. BC325537, BC331468. Emilie H. Elias, Judge.

DISPOSITION: Reversed with directions.

COUNSEL: Law Offices of David J. Wilzig and David J. Wilzig for Objectors and Appellants.

Klika, Parrish & Bigelow, G. Peter Klika and Franklin T. Bigelow, Jr., for Defendant and Respondent Samuel K. Zia.

Law Offices of Uzzell S. Branson III and Uzzell S. Branson III for Defendant and Respondent Allied Physicians of California.

Law Offices of Paul A. Beck and Paul A. Beck for Defendant and Respondent Network Medical Management, Inc.

Weston, Benshoof, Rochefort, Rubalcava & MacCuish, Jonathan M. Gordon, James D. Sloan and Diana Chen for Defendant and Respondent James Chang.

JUDGES: CROSKEY, J.; KLEIN, P.J., ALDRICH, J. concurred.

OPINION BY: CROSKEY

OPINION

In these consolidated appeals, Chi Lam, [*2] Erlinda Koo, and Wen T. Chiang (Objectors) appeal an order approving the dismissal of two related shareholder derivative actions after the trial court approved a settlement of both actions. Objectors contend the settlement unfairly allows the plaintiffs to gain majority control of both corporations and the court approved the settlement despite a conflict of interest between the plaintiffs and the corporations whose interests they purportedly represent. The defendants refute those contentions and contend Objectors have no standing to appeal and appealed from nonappealable orders. We conclude that the order approving the dismissals is appealable, that Objectors have standing to appeal the order, and that the settlement approval was an abuse of discretion.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Parties*

Allied Physicians of California (APC) is an independent practice association and a professional medical corporation. APC contracts with health insurers to deliver health care services. Network Medical Management,

Inc. (NMM), is a corporation that provides management services to medical organizations. The shareholders of APC formed NMM in 1994. NMM was merged into APC in 1995, [*3] and became a separate corporation again in 1996 when shares of NMM were distributed to APC's shareholders.

Samuel K. Zia was chairman of the board of directors and chief executive officer of both APC and NMM, and owned over 30 percent of the shares of each corporation. James Chang was chief operating officer of APC and chief financial officer and a director of NMM, and owned approximately four percent of the shares of NMM. Objectors were directors of NMM until October 2005, each owned shares of both corporations, and they collectively owned approximately eight percent of the shares of each corporation.

2. *Management Services Agreements*

APC and NMM entered into a Management Services Agreement in 1994 in which NMM agreed to provide management and administrative services to APC for a monthly fee of 10 percent of APC's gross revenues. They entered into a new Management and Administrative Services Agreement in 1997 (1997 MSA) providing for greater compensation to NMM. They entered into an Amended and Restated Management and Administrative Services Agreement in 1999 (Amended MSA) providing for still greater compensation to NMM, including 25 percent of all revenues from contracts with [*4] health insurers, a monthly graduated flat fee, a monthly "bonus" payment of five percent of APC's gross revenue, and reimbursement of certain expenses.

3. *Yip v. Zia*

Eleven APC shareholders, collectively owning approximately 30 percent of APC's shares of stock, filed a verified complaint in December 2004 against Zia, Chang, APC, NMM, and five other individuals (*Yip v. Zia* (Super. Ct. L.A. County, No. BC325537) (*Yip*)). [1] The plaintiffs' first amended verified complaint filed in December 2004 alleged that the compensation paid to NMM under the Amended MSA was excessive and that the primary beneficiary of the excessive compensation was Zia, that other APC directors also had benefited personally at the expense of the corporation, and that NMM's services to APC were substandard. It alleged 14 counts by the plaintiffs derivatively on behalf of APC, including counts one through seven for rescission of the Amended MSA and 1997 MSA, count eight alleging NMM's breach of the Amended MSA, counts nine and ten alleging Zia's breach of fiduciary with respect to both the Amended MSA and over $224,648 in loans by APC to corporations owned by Zia (count ten is also against Chang), count [*5] eleven to invalidate a section of APC's bylaws and remove Zia as a director, count twelve to remove Zia and other directors, count thirteen to invalidate the prior APC election of directors and order a new election, and count fourteen to invalidate the Amended MSA, the Shareholder Agreement, and a restriction printed on APC's share certificates. Counsel for the plaintiffs was Nelson E. Brestoff.

1 The plaintiffs named in the first amended complaint are Felix Yip, Thomas Lam, Paul Liu, Eddie Hu, Lakhi Sakhrani, Dennis Chan, Kenneth Sim, Wing Chan, Terry Lee, Raffi Minasian, and Vincent Yu.

APC moved for an order requiring the plaintiffs to furnish a bond on the ground that there was no reasonable possibility that the action would benefit APC's shareholders (*Corp. Code, § 800, subd. (c)*). The plaintiffs did not contest the motion and instead voluntarily furnished a $50,000 bond in February 2004. The parties stipulated to a protective order to prevent disclosure of confidential information. [*6] The individual defendants other than Zia and Chang jointly demurred to the first amended complaint in February 2005. APC, NMM, Zia, and Chang each separately demurred, and Zia joined in some of the other demurrers. The plaintiffs through discovery obtained approximately 17,000 pages of documents from the auditors of APC and NMM in March 2005. Before the hearing on the demurrers, seven of the *Yip* plaintiffs commenced a second action.

4. *Lam v. Zia*

Seven NMM shareholders, collectively owning approximately 30 percent of NMM's shares of stock, represented by Brestoff, filed a verified complaint in April 2005 against Zia, three corporations owned by Zia, Chang, NMM, APC, a subsidiary of NMM known as Physicianquest.com, Allied Professional Networks, Inc., each of the three Objectors, and two other individuals (*Lam v. Zia* (Super. Ct. L.A. County, No. BC331468) (*Lam*)). [2] The complaint alleged that the minutes of meetings of NMM's board of directors were falsified to state that the board had approved a $10,488 payment to Zia and had forgiven debts totaling $953,815.25 that Zia owed to the corporation. It also alleged that NMM made $706,773 in unsecured loans to Physicianquest. [*7] com and that the losses of Physicianquest.com over a five-year period exceeded $1 million. It alleged that Zia, Chang, and Chi Lam were directors of both NMM and Physicianquest.com and shareholders of Physicianquest.com, that they received $273,000 in directors' fees from Physicianquest.com during the same five-year period, and that they failed to disclose to NMM's board of directors their financial interests in Physicianquest.com.

2 The named plaintiffs are Thomas Lam, Felix Yip, Paul Liu, Eddie Hu, Lakhi Sakhrani, Terry Lee, and Vincent Yu. Each of the *Lam* plaintiffs is also a plaintiff in *Yip*.

The complaint alleged 11 counts, including counts one, two, and three for rescission of ultra vires actions, relating to the alleged payment to Zia and debt forgiveness; counts four through seven alleging that Zia, Chang, Objectors, and others breached their fiduciary duties owed to NMM in connection with those same transactions and the loans to Physicianquest.com; count eight against fictitious defendants [*8] for breach of fiduciary duty, alleging the usurpation of a corporate opportunity involving a joint venture; counts nine and ten for rescission of two agreements between NMM and Zia and rescission of the management services agreements; and count eleven for an accounting of NMM. The plaintiffs alleged all counts other than counts six and seven derivatively on behalf of NMM. The plaintiffs did not serve the complaint on any defendants.

Brestoff later declared, in connection with NMM's motion to disqualify him as counsel for the plaintiffs, that his initial fee agreement with the *Lam* plaintiffs included a waiver of potential conflicts stating: "Some of the Clients are also shareholders in both APC and NMM. This is an actual conflict of interest, not between individuals but between one's own interests. The shareholder derivative lawsuit, if successful, would benefit APC but harm financially NMM. An individual Client with shareholder interests in both APC and NMM would be benefitted by success for APC but harmed by detriment to NMM. Each such Client hereby acknowledges and WAIVES this conflict of interest."

5. *Stay, Mediation, and Motion for Settlement Approval*

On April 11, 2005, at [*9] the hearing on the demurrers to the plaintiffs' complaint in *Yip*, the court continued the hearing and stayed both actions to allow the parties an opportunity to engage in mediation. The plaintiffs in both actions filed a joint statement of related cases that same day stating that the two actions involved several common plaintiffs and defendants and similar allegations. They stated that both count seven in *Yip* and count ten in *Lam* sought to invalidate the management services contract between APC and NMM on the ground that it "has an illegal object, namely to permit NMM to control APC in violation of the ban against the corporate practice of medicine." The court designated the two actions related and ordered the *Lam* complaint to be sealed pursuant to the defendants' request on April 26, 2005.

Some of the named parties attended a mediation on June 1 and 2, 2005. Objectors represent that they attended the second day of mediation at the invitation of the mediator, although they were not represented by counsel. Ten of the eleven plaintiffs in the two actions and Zia executed a Settlement Term Sheet dated June 2, 2005, providing for Zia to convey all of his interests in APC, [*10] NMM, and five other entities to the plaintiffs in exchange for monetary payments to Zia. The Settlement Term Sheet also provided for the termination of Zia's employment and the termination of contracts with Zia and his companies, and for mutual general releases.

On July 20, 2005, the plaintiffs jointly in both actions moved for court approval of the settlement agreement and for entry of a judgment pursuant to the settlement (*Code Civ. Proc., § 664.6*). They argued, "The primary reason the Court should approve the [settlement agreement] is that the transaction was sufficient inducement for the Plaintiffs to end the litigation." The plaintiffs stated that after acquiring Zia's stock under the terms of the settlement, they would own approximately 65 and 71 percent of shares of stock of APC and NMM, respectively. They argued that the settlement would deprive Zia of control of the corporations and prevent further abuse of powers, and that ending the litigation was in the best interests of the corporations. The plaintiffs requested the dismissal of both actions in their entirety and submitted a proposed judgment stating the terms of the proposed settlement [*11] and dismissing the actions. The motion was scheduled for hearing on August 26, 2005.

6. *Second Mediation, Motion for Intervention, and Amended Settlement*

A second mediation took place on July 20, 2005. Objectors attended the mediation, this time represented by counsel. On August 8, 2005, Objectors moved for leave to intervene as plaintiffs in *Yip*. They argued that as directors of NMM, they were interested in both *Yip* and *Lam*. The plaintiffs in both actions jointly opposed the motion arguing that Objectors had no direct interest in *Yip*. According to the parties, the court denied the motion but stated that any shareholder of either APC or NMM could file a written opposition to the plaintiffs' motion for settlement approval. [3]

3 No order ruling on the motion for intervention is included in the appellate record or listed in the register of actions.

The plaintiffs amended their motion to approve the settlement agreement on August 12, 2005. They represented that the plaintiffs, Zia, and APC [*12] had approved an unsigned Equity Interest Transfer and Litigation Settlement Agreement (Revised Settlement Agreement), and that the plaintiffs would file the signed agreement when it became available. The agreement provided for Zia to convey all of his interests in APC,

NMM, and five other entities to the plaintiffs in exchange for $5 million. It also provided for the termination of Zia's employment and contracts with Zia and his companies, and his resignation as an officer and/or director of each company. The Revised Settlement Agreement provided that all outstanding shares of NMM stock must be converted to shares of APC stock, except that Chang's shares would not be converted because he was not a medical doctor. The agreement provided further that in lieu of conversion, NMM shareholders other than the plaintiffs and Zia could tender their shares for purchase by the plaintiffs within 30 days after court approval of the settlement for between $0.30 and $1.00 per share, and required Zia to provide $300,000 to fund the purchase and potentially more. The agreement provided for the mediator to administer this "buyout." The agreement also provided an option for APC shareholders who were [*13] not also NMM shareholders to sell their shares to APC for $1.00 per share. The agreement provided for the dismissal of *Yip*, *Lam*, and a third action (*Zia v. AMG Properties, LLC* (Super. Ct. L.A. County, No. GC035125) (*AMG Properties*)) and provided for mutual general releases between the parties to the agreement. Zia joined in the motion for approval of the Revised Settlement Agreement.

The plaintiffs filed an ex parte application on August 15, 2005, for permission to conduct shareholders' meetings for both APC and NMM for the sole purpose of obtaining the shareholders' approval of the proposed settlement. Chang opposed the application on the ground that the settlement did not include all parties to the litigation and that as a director of NMM he had insufficient information to evaluate the settlement.

The plaintiffs filed a second amendment to their motion to approve the settlement on August 18, 2005. They stated that some, but not all, of the parties had signed the Equity Interest Transfer and Litigation Settlement Agreement. The agreement provided was substantially the same as the prior proposed Equity Interest Transfer and Litigation Settlement Agreement, but with [*14] some changes. We will refer to the amended document as the Second Revised Settlement Agreement. It was signed by all of the plaintiffs in both *Yip* and *Lam* except Hu and Lee, by Zia, his wife, and his various companies, and by Liu on behalf of AMG Properties, LLC, and AMG, Inc. Zia joined in the second amended motion to approve the settlement agreement.

On August 18, 2005, the court granted the plaintiffs' August 15 ex parte application and directed APC and NMM to give notice by first class mail not later than August 19, 2005, of shareholders' meetings to be held on September 1, 2005. The court continued the hearing on the motion to approve the settlement to September 19, 2005.

7. *Shareholder Meetings*

Shareholder meetings of APC and NMM took place on September 1, 2005. The mediator, a retired federal magistrate judge, was elected by the shareholders to chair both meetings. The mediator filed a declaration on September 6, 2005, describing the history of the parties' mediation efforts, the resulting agreements, and the shareholder meetings. A third party presented a letter of interest at the meeting offering to purchase all of the assets or shares of APC and NMM for between [*15] $16 million and $17.5 million, and another third party presented a letter of interest offering to purchase "the business and/or assets" of both corporations for a price to be determined based on per-patient multipliers. The mediator reported that the Second Revised Settlement Agreement was approved by votes of 83.28 percent of APC's voting shares and 77.07 percent of its outstanding shares, and 79.90 percent of NMM's voting shares and 75.81 percent of its outstanding shares.

8. *Motion to Disqualify Counsel, Election of Directors, and Further Proceedings on the Motion for Settlement Approval*

Objectors, NMM, and Chang opposed the motion to approve the settlement arguing, inter alia, that the proposed settlement benefited the plaintiffs and Zia but did not benefit the corporations or their shareholders and that the settlement violated Corporations Code requirements concerning mergers and reorganizations. The same parties also argued that the interests of the *Yip* plaintiffs as APC shareholders seeking to invalidate the Amended MSA conflicted with the interests of NMM, for which the Amended MSA is an important source of revenue, and that Brestoff's representation of shareholders [*16] of both corporations in the two derivative actions was prohibited as a simultaneous representation of parties with conflicting interests.

NMM filed a motion to disqualify the plaintiffs' counsel on September 15, 2005, arguing that Brestoff could not simultaneously represent both the *Yip* plaintiffs in their effort to invalidate the Amended MSA, against the interests of NMM, and NMM's shareholders derivatively on behalf of NMM. NMM sought to disqualify the plaintiffs' counsel in both *Yip* and *Lam*. The motion was scheduled for hearing on October 19, 2005. The plaintiffs opposed the motion arguing that their counsel represented only the plaintiffs individually and did not represent NMM.

After a hearing on the motion for settlement approval on September 19, 2005, the court took the motion under submission. The plaintiffs filed supplemental papers on September 22, 2005, supporting their valuation of

NMM's shares. Zia filed a newly revised settlement agreement (Third Revised Settlement Agreement) the same day. Under the Third Revised Settlement Agreement, the conversion of NMM stock to APC stock is optional rather than mandatory, NMM shares tendered for sale in lieu of conversion [*17] are purchased by the corporation and retired rather than purchased for the plaintiffs, Zia's $300,000 contribution for the purchase is made nonrefundable, and Zia is required to provide an additional $50,000 to each corporation. The Third Revised Settlement Agreement was signed by all of the plaintiffs in *Yip* and *Lam* other than Hu, by Zia, his wife, and his various companies, and by Liu, Thomas Lam, and Zia collectively on behalf of AMG Properties, LLC, AMG, Inc., and ZLL, LLC. Objectors, NMM, and Chang filed supplemental responsive papers opposing the amended settlement.

The court in an order filed on October 5, 2005, stated: "The Court has considered the supplemental papers and is preliminarily persuaded that the terms discussed therein support approval of the settlement agreement. The Court finds the financial materials sufficient to show that the corporations and their shareholders, on balance, will benefit from the settlement. "However, the terms discussed in the supplemental papers amount to new terms, effectually raising a new settlement proposal. The Court will treat the supplemental papers as a new motion for approval of settlement and will decide the motion on shortened [*18] notice. In the interests of due process and fair play, the Court grants any party opposing the new proposal an opportunity to file opposition papers that solely address the merits of the agreement-i.e., whether and how the new terms do not benefit the corporations and the shareholders. Any opposition papers shall be filed and served on or before October 12, 2005. The Court is inclined at this time to decide the motion without oral arguments." The court later extended the time to oppose the motion for settlement approval to October 17, 2005, as requested by Objectors. Objectors, NMM, and Chang filed additional papers opposing the settlement.

APC filed an ex parte application on October 11, 2005, for permission to conduct shareholder meetings on October 25, 2005, to elect new directors for both APC and NMM. APC argued that the directors of both corporations were elected on October 7, 2004, for a one-year term that had expired, and that several directors had resigned. Zia joined in the application. The court granted the application.

The court granted the motion to disqualify plaintiffs' counsel in an order filed on October 24, 2005. The court concluded that rescission of the Amended [*19] MSA, NMM's principal source of income, as requested in both *Yip* and *Lam*, would benefit APC but harm NMM. It therefore concluded that the interests of APC's shareholders actually conflicted with the interests of NMM's shareholders. It concluded further that Brestoff as counsel for the plaintiffs in these shareholder derivative actions owed a fiduciary duty to the corporations and the unnamed shareholders, and that the *Lam* plaintiffs' written conflict waiver did not waive the conflict on behalf of the two corporations and their unnamed shareholders. The court stayed the order for 10 days to allow counsel an opportunity to seek extraordinary writ review.

The court also filed a minute order on October 24, 2005, approving the proposed settlement. The order stated: "[T]he court has considered the supplemental papers filed pursuant to the court's order of October 5, 2005. The court finds the arguments unavailing and insufficient to show that the corporations and shareholders, as a whole, will not gain from the settlement. As noted in the court's previous order, the new settlement terms and the financial materials in the record demonstrate that the corporations and shareholders [*20] will benefit. [P] Therefore, the court hereby grants the motion and approves the new settlement proposal."

Objectors were voted out as directors of NMM on October 25, 2005, and several of the *Yip* plaintiffs were elected as directors at that time. The results of the APC board election do not appear in the appellate record.

9. *Dismissals and Further Proceedings*

The plaintiffs, still represented by Brestoff, filed an ex parte application requesting an order exonerating the plaintiffs' bond, modifying the protective order, appointing the mediator as NMM's buyout administrator, and approving the entry of dismissals. Objectors opposed the application and objected to Brestoff's continued representation of the plaintiffs. The court in a signed order filed on November 3, 2005, granted the relief requested, with the exception of the requested modification of the protective order. The court concluded that dismissal was appropriate based on the approved settlement, regardless of the disqualification of the plaintiffs' counsel. A minute order in *Yip* filed together with the signed order stated, "Pursuant to the terms of the order entered this date, dismissals of the above entitled [*21] action and related case BC331468 are entered this date." The clerk entered a dismissal in each action against all defendants on November 3, 2005, on request for dismissal forms submitted by the plaintiffs. The court did not enter a formal judgment.

NMM, represented by new counsel, filed a notice of withdrawal of its motion to disqualify plaintiffs' counsel in December 2005. The notice stated that the motion was still pending when the actions were dismissed on November 3, 2005, because the 10-day stay had not expired.

Objectors and Chang objected to the notice as an effort to purge the record after the court had heard and ruled on the motion to disqualify. Brestoff filed a declaration in response to the objections stating that he had been unfairly vilified, that Objectors had threatened separate litigation against him based on his dual representation of the plaintiffs in these actions, and that the court had determined that the settlement was in the best interests of both APC and NMM. No party filed any motion with respect to the notice of withdrawal, and the court made no ruling with respect to the notice.

10. *Appeals*

Objectors filed a single notice of appeal on December 21, 2005. The [*22] notice of appeal bears a double caption identifying both the *Yip* and *Lam* actions and states that the appeals are from both the order filed on October 24, 2005, approving the settlement and the dismissal of *Lam* ordered by the court on November 3, 2005. We consolidated the two appeals.

Objectors moved to disqualify Brestoff as plaintiffs' appellate counsel, citing his disqualification by the superior court based on his concurrent representation of parties with conflicting interests. We granted the motion and disqualified Brestoff as appellate counsel for the plaintiffs in both actions. The plaintiffs have not obtained replacement appellate counsel and did not file a respondents' brief.

Zia moved to dismiss the appeals. He argued that the actions were voluntarily dismissed and a voluntary dismissal is nonappealable, that Koo and Chiang accepted the benefits of the settlement by selling some of their shares of NMM pursuant to the buyout provision and therefore waived the right to challenge the order approving the settlement, and that Objectors had no standing to appeal. We denied the motion, but stated that the issues raised by the motion should be considered in light of [*23] the entire record and full briefing.

11. *Other Litigation*

Chi Lam and Koo filed a complaint against Zia on November 12, 2005 (*Lam v. Zia* (Super. Ct. L.A. County, No. GC035933)) alleging counts for breach of fiduciary duty and an accounting pertaining to their investments in APC, NMM, and other business entities. [4] NMM, represented by Brestoff, filed a complaint against Chang on November 18, 2005 (*Network Medical Management, Inc. v. Chang* (Super. Ct. L.A. County, No. BC325537)), alleging counts for declaratory relief, breach of fiduciary duty, and restitution. Chi Lam filed a complaint against Brestoff, Brestoff's law firm, Zia, and the *Lam* plaintiffs on May 23, 2006 (*Lam v. Brestoff* (Super. Ct. L.A. County, No. BC352812)), and filed an amended complaint on August 1, 2006, alleging counts against the attorneys for legal malpractice and breach of fiduciary duty, a count for breach of fiduciary duty against Zia, and a count for breach of fiduciary duty against the *Lam* plaintiffs. [5] Chi Lam alleges in that action that the settlement in the present actions was not in the best interests of NMM's shareholders, that Brestoff committed malpractice and breached his [*24] fiduciary duty owed to NMM's shareholders, and that Zia and the *Lam* plaintiffs colluded in the settlement against the interests of NMM's shareholders.

4 We previously granted Zia's request for judicial notice of the complaint in *Lam v. Zia, supra*, No. GC035933.

5 We previously granted Zia's request for judicial notice of the first amended complaint in *Lam v. Brestoff, supra*, No. BC352812 and Objectors' request for judicial notice of a special motion to strike filed by the *Lam* plaintiffs as defendants in that action.

CONTENTIONS

Objectors contend (1) the settlement was tainted by the plaintiffs' conflict of interest in their dual capacities as representatives of two corporations with conflicting interests and by their common counsel's representation of plaintiffs with conflicting interests, the plaintiffs, rather than the corporations they represented as fiduciaries, received the principal benefits of the settlement, and the settlement was not fair and reasonable to [*25] the corporations; (2) the court approved the dismissal of both actions in its orders on October 24, 2005, and November 3, 2005, so the dismissals were "ordered by the court" (*Code Civ. Proc., § 581d*) and are appealable judgments; and (3) Objectors are aggrieved by the judgment and participated in the action below by opposing the motion for settlement approval, and therefore have standing in these appeals.

Zia disputes those contentions and contends (1) the dismissals were not "ordered by the court" (*Code Civ. Proc., § 581d*), and the voluntary dismissal of the two actions is not an appealable order; (2) Objectors sought no affirmative relief, are not aggrieved by the dismissals, were not parties of record in *Yip*, and have no standing to appeal in either action; (3) two of the three Objectors accepted the benefits of the settlement by participating in the buyback of NMM's shares and therefore waived the right to challenge the order approving the settlement; and (4) the appellate record is inadequate to demonstrate error because there is no reporter's transcript of oral proceedings in connection with the settlement approval.

[*26] APC in its respondent's brief makes some of the same arguments as Zia in support of the court's settlement approval and with respect to the lack of an ap-

pealable order or judgment, Objectors' lack of standing to appeal, and inadequacy of the appellate record. NMM joins in the respondent's briefs of Zia and APC.

Chang takes no position on the merits of order approving the settlement, but seeks to preserve his separate peace. Chang contends Objectors' appeals are limited to challenging the fairness of the settlement as it relates to Zia and the consideration received by Objectors. Chang contends these appeals therefore cannot upset the finality of the dismissal of the actions against him.

The parties also assert other contentions that we need not address.

DISCUSSION

1. *Court Approval of a Settlement in a Shareholder Derivative Action*

A shareholder derivative action is an action brought by one or more shareholders to enforce the rights of the corporation against third parties when the corporation fails to enforce its own rights. Although shareholders nominally are the plaintiffs and the corporation is named as a defendant, the corporation is the real plaintiff and [*27] owner of the cause of action. "Because a corporation is a legal entity separate from its shareholders (*Merco Constr. Engineers, Inc. v. Municipal Court (1978) 21 Cal.3d 724, 729 [147 Cal.Rptr. 631, 581 P.2d 636]*), when a corporation has suffered an injury to its property the corporation is the party that possesses the right to sue for redress. (*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal.2d 448, 453 [289 P.2d 466].*) If a corporation fails to pursue redress of an injury, a shareholder may file a derivative action on behalf of the corporation. The 'derivative' action is so called because the rights of the plaintiff shareholders derive from the primary corporate right to redress the wrongs against it. (*Ibid.*)" (*Desaigoudar v. Meyercord (2003) 108 Cal.App.4th 173, 183.*)

"A shareholder's derivative suit seeks to recover for the benefit of the corporation and its whole body of shareholders when injury is caused to the corporation that may not otherwise be redressed because of failure of the corporation to act. Thus, 'the action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the [*28] corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.' [Citations.] 'A stockholder's derivative suit is brought to enforce a cause of action which the corporation itself possesses against some third party, a suit to recompense the corporation for injuries which it has suffered as a result of the acts of third parties. The management owes to the stockholders a duty to take proper steps to enforce all claims which the corporation may have. When it fails to perform this duty, the stockholders have a right to do so. Thus, although the corporation is made a defendant in a derivative suit, the corporation nevertheless is the real plaintiff and it alone benefits from the decree; the stockholders derive no benefit therefrom except the indirect benefit resulting from a realization upon the corporation's assets. The stockholder's individual suit, on the other hand, is a suit to enforce a right against the corporation which the stockholder possesses as an individual.' [Citation.]" (*Jones v. H. F. Ahmanson & Co. (1969) 1 Cal.3d 93, 107, 81 Cal. Rptr. 592.*) [*29]

A shareholder plaintiff in a derivative action sues on behalf of the corporation and in that capacity owes a fiduciary duty to the corporation and its shareholders. (*Whitten v. Dabney (1915) 171 Cal. 621, 630-631*; *Heckmann v. Ahmanson (1985) 168 Cal.App.3d 119, 128-129, 214 Cal. Rptr. 177*; see *Cohen v. Beneficial Loan Corp. (1949) 337 U.S. 541, 549 [69 S. Ct. 1221, 93 L. Ed. 1528].*) "He is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other. His position in the litigation is in every legal sense the precise equivalent of that of the guardian *ad litem*. The guardian *a[d] litem* stands as the representative of some person incompetent to sue or be sued directly. He is appointed by the court to represent that incompetent's interests; to prosecute or defend with the highest diligence and good faith. . . . The principles governing the conduct of a guardian *ad litem* are in full strictness applicable to the conduct of such a plaintiff stockholder." (*Whitten, supra, at pp. 630*631; accord, *Hogan v. Ingold (1952) 38 Cal.2d 802, 809-810.*) [*30] *Whitten* stated further that a shareholder plaintiff in a derivative action acts in a "fiduciary capacity." (*Id. at p. 631*; accord, *Hogan, supra, at pp. 810, 812.*) Similarly, the United States Supreme Court in *Cohen v. Beneficial Loan Corp., supra, 337 U.S. at page 549* stated, "a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character."

A shareholder plaintiff in a derivative action must obtain court approval before settling and dismissing the corporation's cause of action. (*Whitten v. Dabney, supra, 171 Cal. at pp. 631-632*; *Ensher v. Ensher, Alexander & Barsoom (1960) 187 Cal.App.2d 407, 410, 9 Cal. Rptr. 732.*) A court must not approve such a settlement unless and until, "after scrutiny and examination, it shall be determined by that court that the corporation's rights are fully protected." (*Whitten, supra, at p. 632.*) As in a class action, court approval of a settlement in a shareholder derivative action is required to ensure that the settlement is fair and reasonable [*31] to the corporation and its

shareholders and that the settlement is not a product of fraud, overreaching, or collusion by the settling parties. (*Robbins v. Alibrandi (2005) 127 Cal.App.4th 438, 449*; cf. *Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1800-1801* [class action].)

A court determining whether to approve a settlement in a shareholder derivative action must consider all of the relevant circumstances, including, without limitation, (1) the probability of success on the plaintiffs' claims, (2) the difficulty and expense of enforcing those claims and likely duration of further litigation, (3) the stage of the litigation and extent of discovery completed, (4) the amount offered in settlement to the corporation and its shareholders, (5) the experience and views of competent counsel, and (6) the reaction of the corporation and its shareholders to the settlement. (cf. *Dunk v. Ford Motor Co., supra, 48 Cal.App.4th at p. 1801* [class action]; see *Polk v. Good (Del. 1986) 507 A.2d 531, 536* [shareholder derivative action].) Although experienced and competent counsel can help to ensure that a settlement is [*32] fair and reasonable to the corporation, a settlement negotiated by a plaintiffs' counsel affected by a conflict of interest cannot be presumed to be in the best interests of the corporation and its shareholders. (Cf. *Robbins v. Alibrandi, supra, 127 Cal.App.4th at p. 449* [requiring careful consideration of a negotiated attorney fee provision in a shareholder derivative settlement due to the potential for abuse by plaintiffs' counsel]; see *In re Pacific Enterprises Securities Litigation (9th Cir. 1995) 47 F.3d 373, 378* ["If, however, the settlement negotiations are biased, or skewed by a conflict of interest, we cannot presume that the attorneys have reached a fair settlement"].) A settlement negotiated by a plaintiffs' counsel who concurrently represents parties with conflicting interests is inherently suspect, and the court should subject such a settlement to heightened scrutiny.

Apart from calling into question the role of the plaintiffs' attorney in the settlement, the conflict of interest here also raises serious doubts as to the plaintiffs' ability to fairly and adequately act as representatives of the two corporations and the plaintiffs' [*33] incentive to enter into a settlement on terms that are fair and reasonable to the corporations and all of the shareholders. A representative seeking class certification must show that he or she adequately represents the class and that the representative's interests are typical of, and not antagonistic to, those of the other class members. (*Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 470, 174 Cal. Rptr. 515*; *J. P. Morgan & Co., Inc. v. Superior Court (2003) 113 Cal.App.4th 195, 212*.) A court considering settlement approval before class certification, and before a determination is made as to the adequacy of representation, must scrutinize the settlement more carefully to guard against unfairness. (*Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 240*; *Dunk v. Ford Motor Co., supra, 48 Cal.App.4th at p. 1803, fn. 9*.) Although there is no express statutory requirement in California that a plaintiff in a shareholder derivative action must adequately represent the corporation and its shareholders (see *Corp. Code, § 800, subd. (b)* [stating, generally, that the plaintiff must [*34] be a shareholder or holder of voting trust certificates]; see also DeMott, Shareholder Derivative Actions Law and Practice (2003) Procedural Considerations, § 4:4, pp. 4-68 to 4-86 [discussing adequacy of representation in shareholder derivative actions under federal and state laws]), [6] and no established procedure in California to make that determination in a shareholder derivative action comparable to a class certification hearing in a class action, we find the similarities between the court's role approving a settlement in a class action and its role approving a settlement in a shareholder derivative action compelling. Accordingly, we conclude that the adequacy of the plaintiffs' representation of the corporation and its shareholders is an important consideration for the court in determining whether a settlement in a shareholder derivative action is fair and reasonable.

> 6 In contrast to *Corporations Code section 800, subdivision (b)(1), Rule 23.1 of the Federal Rules of Civil Procedure* (28 U.S.C.), governing federal shareholder derivative actions, expressly states, "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."

[*35] 2. *The Order Approving the Dismissals Is Appealable*

The court approved the settlement in its order of October 24, 2005, and approved the entry of dismissals of both actions in its order of November 3, 2005. The clerk then entered dismissals on the request for dismissal forms provided by the plaintiffs. " '[T]he question, as affecting the right of appeal, is not what the form of the order or judgment may be, but what is its legal effect.' " (*Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 698-699, 63 Cal. Rptr. 724*.) Although the court did not formally dismiss the actions in a signed order (see *Code Civ. Proc., § 581d*) [7] and entered no formal judgment, [8] we conclude that absent a formal judgment, the legal effect of the November 3 order granting the required approval to dismiss the actions was to dismiss the actions. We therefore conclude that the November order is in legal effect an appealable order of dismissal.

7 *Code of Civil Procedure section 581d* states, in pertinent part, "All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments . . . ."

[*36]

8 *Rule 3.769 of the California Rules of Court* establishes procedures for court approval of a class action settlement. Subdivision (h) states: "If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment." Although there is no comparable court rule requiring entry of a formal judgment with a provision for the retention of jurisdiction upon settlement of a shareholder derivative action, a formal judgment is appropriate to reflect the court's ruling and terminate the action, and the retention of jurisdiction to enforce the settlement would be advisable.

Objectors' notice of appeal states that they appeal the order of October 24, 2005, approving the settlement as to both *Yip* and *Lam* and appeal the order of November 3, 2005, as to *Yam* only. We liberally construe the reference to the nonappealable October 24 order to encompass the later appealable order of November [*37] 3. (*Cal. Rules of Court, rule 8.100(a)(2)*; *Luz v. Lopes (1960) 55 Cal.2d 54, 59, 10 Cal. Rptr. 161* ["notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from"].) We therefore conclude that Objectors timely appealed the order of dismissal as to both *Yip* and *Lam*.

3. *Objectors Have Standing to Appeal*

Only a party aggrieved by the judgment or appealable order has standing to appeal. (*Code Civ. Proc., § 902* ["Any party aggrieved may appeal in the cases prescribed in this title"].) A party who has an interest recognized by law that is adversely affected by the judgment or order is an aggrieved party. (*County of Alameda v. Carleson (1971) 5 Cal.3d 730, 737, 97 Cal. Rptr. 385*; *Cesar V. v. Superior Court (2001) 91 Cal.App.4th 1023, 1035.*) The interest must be immediate and substantial, and not nominal or remote. (*County of Alameda, supra, at p. 737*; *In re L. Y. L. (2002) 101 Cal.App.4th 942, 948.*) Although standing ordinarily is limited [*38] to parties of record either named in the complaint or made parties through intervention, other persons aggrieved by the judgment or order also have standing to appeal in some circumstances. (*County of Alameda, supra, at p. 736* [an aggrieved nonparty denied the right of intervention can appeal from the order denying intervention]; *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at p. 235* [an unnamed class member who objected to a settlement has standing to appeal in a class action]; *Trotsky v. Los Angeles Fed. Sav. & Loan Assn. (1975) 48 Cal.App.3d 134, 139-140, 121 Cal. Rptr. 637* [same]; *Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal.App.4th 289, 295* [a nonparty who is bound by res judicata has standing to appeal]; see *Devlin v. Scardelletti (2002) 536 U.S. 1, 6-11 [122 S. Ct. 2005, 153 L. Ed. 2d 27]* [an unnamed class member who objected to a settlement in a class action is a party for purposes of appeal].)

Trotsky v. Los Angeles Fed. Sav. & Loan Assn., supra, 48 Cal.App.3d 134 held that an unnamed plaintiffs' class member who appeared at the settlement approval [*39] hearing and objected to the settlement had standing to appeal the judgment approving the class action settlement. The court concluded that the appellant was aggrieved by the settlement approval over his objections, and stated that if the appellant were denied standing there would be no appellate review of the settlement approval. (*Id. at pp. 139-140.*) *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th 224* followed *Trotsky* and held that class members who objected to the settlement in the trial court had standing to appeal the judgment approving the class action settlement. (*Id. at pp. 235*-236.)

A shareholder derivative action seeks redress for an injury to the corporation, but affects the interests of the individual shareholders as well through their ownership of the corporation. The settlement of a derivative action presents unusually strong incentives toward settlement and a significant potential for collusion in settlement at the expense of the corporation and its shareholders. (See *Bell Atlantic Corp. v. Bolger (3d. Cir. 1993) 2 F.3d 1304, 1310* & fn. 10; Coffee, *Understanding the Plaintiff's Attorney:* [*40] *The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions* (1986) *86 Colum. L.Rev. 669, 714-716.*) Careful judicial review of the fairness and reasonableness of a settlement is warranted to guard against this potential. The ability of unnamed shareholders to object to a settlement helps to protect against collusive settlements and, when an objection is made, encourages more careful judicial review of the settlement. The only meaningful opportunity for appellate review of the court's approval of a settlement in which both the plaintiffs and the defendants concur is in an appeal by an objecting shareholder. In these circumstances, to require an objecting shareholder to seek leave to intervene solely for the purpose of creating appellate standing would be a pointless formalism. (See *Bell Atlantic, supra, at p. 1310* [so concluding]; Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?* (1998) *66 Tenn. L.Rev. 81,*

132 [same]; but see *Felzen v. Andreas (7th Cir. 1998) 134 F.3d 873, 876* [contra], affd. by an [*41] equally divided court *sub nom. California Public Employees' Retirement System v. Felzen (1999) 525 U.S. 315 [119 S. Ct. 720, 142 L. Ed. 2d 766]* (*per curiam*).)

In our view, a shareholder who objects to a settlement in the trial court is aggrieved by the court's approval of the settlement over the shareholder's objection. The settlement and dismissal of the corporation's claim has an immediate and substantial effect on the objector's interests as a shareholder. Moreover, allowing an appeal by an objecting shareholder facilitates appellate review of an important decision by the trial court that should not be immune from appellate review. Accordingly, although Objectors were named as parties only in *Lam* and not in *Yip*, we conclude that Objectors as shareholders who objected to the settlement are aggrieved parties with standing to appeal the order of dismissal in both actions. (Cf. *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at p. 235*; *Trotsky v. Los Angeles Fed. Sav. & Loan Assn., supra, 48 Cal.App.3d at pp. 139-140.*)

Continental Vinyl Products Corp. v. Mead Corp. (1972) 27 Cal.App.3d 543, 103 Cal. Rptr. 806, [*42] cited by Zia, is not on point. *Continental Vinyl Products* held that the interest of a shareholder in the value of his shares of stock was not sufficiently direct to justify his intervention in an action by a bankruptcy trustee against debtors of the corporation. *Continental Vinyl Products* involved neither a shareholder derivative action, nor a motion for settlement approval, nor the question of standing on appeal, and therefore is distinguishable.

4. *Chi Lam Did Not Voluntarily Accept the Benefits of the Judgment and Is Not Barred from Challenging the Order Approving the Settlement*

The voluntary acceptance of the benefits of a judgment ordinarily bars a challenge to the judgment on appeal. An appellant is barred, however, only if the appellant's acquiescence in the judgment was "clear and unmistakable," meaning the appellant's acceptance of the fruits of the judgment was " ' "unconditional, voluntary, and absolute," ' " and only if the appellant would not be entitled to the benefits accepted in the event of a reversal. (*In re Marriage of Fonstein (1976) 17 Cal.3d 738, 744, 131 Cal. Rptr. 873.*) An appellant is not barred if the appellant accepted the benefits [*43] of the judgment due to legal or economic compulsion. (*Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc. (1998) 64 Cal.App.4th 955, 961-962*; see *Mathys v. Turner (1956) 46 Cal.2d 364, 366.*)

Zia argued in his motion to dismiss the appeals that Koo and Chiang, but not Chi Lam, voluntarily sold some of their shares of stock of NMM pursuant to the settlement and therefore waived the right to challenge on appeal the order approving the settlement. Zia filed a declaration by the mediator stating that he served as administrator of the NMM buyout and that Koo and Chiang tendered 140,000 shares of stock for repurchase by NMM pursuant to the settlement. Koo and Chiang argued that they acted under economic compulsion.

Zia does not contend Chi Lam voluntarily accepted the benefits of the settlement or challenge the appeals by Chi Lam on this ground. We need not decide whether Koo and Chiang voluntarily accepted the benefits of the settlement because regardless of whether Koo and Chiang can prosecute these appeals, Chi Lam as a shareholder of both APC and NMM can do so. A dismissal of the appeals as to Koo and Chiang would in no way limit Chi Lam's [*44] ability to prosecute these appeals, so the question of dismissal as to Koo and Chiang is moot.

5. *The Settlement Approval Was Error*

A trial court's approval of a settlement in a shareholder derivative action based on its consideration of the relevant factors involves an exercise of discretion. (Cf. *Dunk v. Ford Motor Co., supra, 48 Cal.App.4th at p. 1801.*) Our task on appeal is not to reweigh those factors or substitute our own notions of fairness for those of the trial court. Rather, we only determine whether the record shows an abuse of discretion. (Cf. *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at p. 245*; *Dunk, supra, at p. 1802.*) To the extent the court's ruling is based on improper criteria or incorrect legal assumptions, we review those questions of law de novo. (*Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 436*; *Wershba, supra, at p. 235.*)

The record clearly shows that the primary consideration under the settlement for release of the claims against Zia is not a monetary payment or other benefit in favor of the corporations, but the sale of Zia's blocks of [*45] shares to the plaintiffs. In this manner, the plaintiffs through settlement of the corporations' causes of action gain majority control of both APC and NMM. [9] Regardless of whether the shares are sold to the plaintiffs at fair value or at a discount, the opportunity to purchase the shares and gain control of both corporations is a valuable benefit that is denied to other shareholders under the terms of the settlement. The amounts payable by Zia to the corporations and for the NMM buyout are modest compared to the valuable rights of corporate control bestowed on the plaintiffs. Thus, the settlement clearly favors the plaintiffs over the corporations and other shareholders.

9 The plaintiffs also acquire Zia's interests in five other companies under the settlement. Alt-

hough there is no meaningful information in the record about the value of those interests, the settlement excludes APC's and NMM's other shareholders from the opportunity to purchase those interests. The settlement also provides for the dismissal of Zia's lawsuit against AMG Properties, LLC. Although there is no information in the record about that action, it appears that the dismissal of the action benefits Liu and Thomas Lam personally (both of whom, together with Zia, signed the settlement agreement on behalf of AMG Properties, LLC, and two other entities that apparently are involved in that action) but does not benefit APC or NMM.

[*46] The plaintiffs' counsel acknowledged in his retainer agreement with the *Lam* plaintiffs the actual conflict of interest between the plaintiffs acting on behalf of APC and those acting on behalf of NMM. In light of counsel's divided loyalties resulting from his concurrent representation of parties with conflicting interests, the settlement is inherently suspect, and counsel's views on the benefits of the settlement to the corporations are unreliable and provide no assurance against unfairness to the corporations or collusion. The plaintiffs' own conflict of interest in their dual capacities as representatives of the two corporations with conflicting interests also creates a significant and perhaps insurmountable risk of unfairness to one or both of the corporations. In our view, the conflict of interest affecting both the plaintiffs and their common counsel severely undermines any confidence in the fairness of the settlement to the corporations and other shareholders.

We conclude based on the present record that the other relevant factors cannot overcome the fundamental deficiencies that we have identified, and that the record discloses no reasonable basis to conclude that the [*47] settlement is fair and reasonable to the corporations and their shareholders. [10] The defendants' arguments as to the benefits of ending this costly litigation do not justify ending the litigation on terms so favorable to the plaintiffs, without adequate shareholder representatives, and with conflicted plaintiffs' counsel. We conclude that the court's approval of the settlement was error.

10 We reject the defendants' argument that the appellate record is inadequate to demonstrate error due to the absence of a reporter's transcript of oral proceedings in connection with the motion for settlement approval. The absence of a reporter's transcript of an evidentiary hearing precludes effective review of the sufficiency of the evidence. In those circumstances, the judgment is conclusively presumed correct as to all evidentiary matters. (*Estate of Fain (1999) 75 Cal.App.4th 973, 992.*) This rule is inapplicable here, however, because there is no indication that any oral testimony was presented at the hearings in connection with the motion for settlement approval.

[*48] Our conclusion that the court's approval of the settlement was error compels the conclusion that the dismissals must be reversed as to all parties, including Chang. Chang was dismissed pursuant to the settlement, which provided for the dismissal of the complaints against all defendants in both actions. He has not shown either that Objectors appealed from only a severable part of the order of dismissal not including the dismissal as to him (e.g., *Gonzales v. R. J. Novick Constr. Co. (1978) 20 Cal.3d 798, 804-805, 144 Cal. Rptr. 408*) or that either the settlement or the dismissals were severable as to him and unaffected by error.

We will therefore reverse the judgment with directions to the superior court to vacate the order approving the settlement. Objectors do not request any other relief on appeal. In light of events that may have occurred pursuant to the settlement, however, including the sale of Zia's shares of stock in APC and NMM to the plaintiffs, the conversion of shares of NMM stock to shares of APC stock, and the repurchase of shares of NMM stock by NMM or APC, further relief may be appropriate to prevent the settlement from becoming a fait accompli and [*49] to ensure the effectiveness of the relief we order. The superior court in the first instance should consider the evidence and argument that may be presented by the parties as to the scope of any further relief, and act accordingly. In light of our conclusions, we need not address the parties' other contentions.

DISPOSITION

The order of November 3, 2005, dismissing the two actions is reversed with directions to the superior court to (1) vacate the order of October 24, 2005, approving the settlement; (2) enter a new order denying the motion for settlement approval; and (3) conduct such further proceedings to determine the scope of any further relief as may be appropriate and consistent with the views expressed herein. Objectors are entitled to recover their costs on appeal.

CROSKEY, J.

We Concur:

KLEIN, P.J.

ALDRICH, J.

YANIV GRINBERG et al., Plaintiffs and Respondents, v. MARIA'S HOLDING CORPORATION, Defendant and Respondent; MICHAEL VINCZE, Objector and Appellant.

B244535

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

2013 Cal. App. Unpub. LEXIS 8324

November 18, 2013, Opinion Filed

PRIOR HISTORY: [*1]

APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC445579, William F. Highberger, Judge.

DISPOSITION: Affirmed.

COUNSEL: George Hakim for Objector and Appellant Michael Vincze.

Eli M. Kantor for Plaintiffs and Respondents Yaniv Grinberg, Anthony Astorino and Cory Miles.

Van Vleck, Turner & Zaller, Brian F. Van Vleck, Daniel J. Turner, Anthony J. Zaller and Farinaz Tojarieh for Defendant and Respondent Maria's Holding Corporation.

JUDGES: MANELLA, J.; WILLHITE, Acting P. J., SUZUKAWA, J. concurred.

OPINION BY: MANELLA, J.

OPINION

Appellant Michael Vincze challenges the judgment entered in the underlying class action pursuant to a settlement, as well as the trial court's ruling that he lacked standing to object to the settlement because his objection was untimely. We conclude that Vincze has standing on appeal solely to contest the ruling regarding his objection to the settlement, and reject his contentions concerning that ruling. We therefore affirm the ruling, and dismiss the remainder of Vincze's appeal.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. *Underlying Class Action and Related Actions*

On September 15, 2010, respondents Yaniv Grinberg, Anthony Astorino, and Cory Miles (Grinberg parties) initiated the underlying [*2] class action (Grinberg action) against respondent Maria's Holding Corporation, d.b.a. Maria's Italian Kitchen (MIK). The Grinberg parties filed the action on behalf of themselves and a putative class of individuals whom MIK employed, or had employed, as delivery drivers. Alleging that MIK had misclassified the delivery drivers as independent contractors, the complaint asserted claims for violations of the Labor Code regarding the provision of minimum wages, meal and rest periods, and related matters, and unfair business practices.[1] The complaint sought to recover unpaid compensation and certain statutory penalties, but made no claim for penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA; *Lab. Code, § 2698 et seq.*).[2]

1 The Grinberg parties' complaint contains claims for failure to pay minimum wages (*Lab. Code, § 1197*, failure to reimburse for the cost of pizza bags and hats (*Lab. Code, § 2802*), failure to reimburse for mileage (*Lab. Code, § 2802*),

failure to provide meal periods (*Lab. Code, § 226.7*), failure to provide rest periods (*Lab. Code, § 226.7*), failure to provide itemized wage statements (*Lab. Code, § 226*), failure to pay wages upon termination (*Lab. Code, 203*), [*3] and unlawful business practices (*Bus. & Prof. Code, § 17200*).

2 PAGA permits aggrieved employees to recover certain statutory penalties that previously could be collected only by the Labor and Workforce Development Agency. (*Dunlap v. Superior Court (2006) 142 Cal.App.4th 330, 335.*)

On June 27, 2011, Julian D. Hakim filed an action against MIK on his own behalf, alleging that he had worked as a delivery driver for MIK (Hakim action). He asserted claims similar to those asserted in the Grinberg action, and sought damages, restitution, and specified statutory penalties (*Lab. Code, § 203*).[3] His original and first amended complaints made no claims for penalties under PAGA.

3 Hakim's original and first amended complaints, filed June 27, 2011 and July 8, 2011, contained claims for failure to provide meal periods (*Lab. Code, §§ 226.7, 512, 558*), failure to pay for missed meal periods (*Lab. Code, § 226.7*), failure to provide rest periods (*Lab. Code, § 226.7*), failure to pay for missed rest periods (*Lab. Code, § 226.7*), failure to keep payroll records (*Lab. Code, § 1174*), failure to provide accurate statements of hours worked (*Lab. Code, § 226*), and unlawful business practices (*Bus. & Prof. Code, § 17200*).

In [*4] July 2011, following discovery and a mediation, the Grinberg parties and MIK reached a settlement agreement regarding the Grinberg action, pending the trial court's approval. Under the agreement, the parties certified a specified class of MIK delivery drivers who had been classified as independent contractors. MIK agreed to pay a maximum of $350,000, inclusive of attorney fees, in exchange for a release of the class members encompassing all claims and causes of action that were raised, or could have been raised, under state and federal law. Although the complaint contained no PAGA claims, the agreement expressly provided that MIK was not liable for any penalties under PAGA. In addition, the agreement stated that class members "waive[d] any potential right to any penalty prescribed by the PAGA."

At some point after the Grinberg parties and MIK reached the settlement agreement, Hunter Stratton, a former MIK delivery driver, filed a class action complaint containing claims similar to those asserted by the Grinberg parties, as well as claims under PAGA (Stratton action). In addition, on September 28, 2011, Hakim filed a seconded amended complaint in his action, which included claims under [*5] PAGA. Later, in November 2011, Joey Harter and William Altomare filed an action against MIK on their own behalf, alleging that they had worked as delivery drivers for MIK. They asserted claims similar to those in Hakim's second amended complaint, and requested penalties under PAGA.[4]

4 Harter and Altomare's complaint, filed November 21, 2011, contained claims for failure to provide meal periods (*Lab. Code, §§ 226.7, 512*), failure to pay for missed meal periods (*Lab. Code, § 226.7*), failure to provide rest periods (*Lab. Code, § 226.7*), failure to pay for missed rest periods (*Lab. Code, § 226.7*), failure to provide accurate statements of hours worked (*Lab. Code, § 226*), and unlawful business practices (*Bus. & Prof. Code, § 17200*). In addition, the complaint sought statutory penalties, including penalties under PAGA.

In early 2012, after Hakim's action was ordered consolidated with Harter and Altomare's action, the three plaintiffs filed a joint complaint, which included claims under PAGA (consolidated Hakim action).[5] The Grinberg, Stratton, and consolidated Hakim actions were assigned to a single judge, who determined them to be related.

5 The joint complaint, filed March 12, 2012, asserted [*6] claims for failure to provide meal periods (*Lab. Code, §§ 226.7, 512*), failure to pay for missed meal periods (*Lab. Code, § 226.7*), failure to provide rest periods (*Lab. Code, § 226.7*), failure to pay for missed rest periods (*Lab. Code, § 226.7*), failure to provide accurate statements of hours worked (*Lab. Code, § 226*), and unlawful business practices (*Bus. & Prof. Code, § 17200*). In addition, the complaint sought statutory penalties, including penalties under PAGA.

B. *Initial Proceedings Regarding Approval of Settlement in the Grinberg Action*

In August 2011, the Grinberg parties filed a motion for preliminary approval of the proposed settlement of their action. In November 2011, the trial court granted the motion, certified the class for purposes of settlement, approved the proposed notice regarding the settlement, and appointed a class administrator to distribute the notice and related documents (collectively, the class notice) to the known members of the class. The class notice stated that any class member who did not request to "[o]pt [o]ut" of the settlement released "any and all . . . claims" against MIK under California or federal law, but

did not specifically refer to claims [*7] under PAGA. The class notice further stated that class members who wished to opt out or object to the settlement were required to do so by January 12, 2012.

On March 1, 2012, the Grinberg parties filed a motion for final approval of the settlement. Supporting the motion was a declaration from the claims administrator, who stated that on December 5, 2011, the class notices and related documents were mailed to the 265 known members of the class at their last known addresses, as shown by MIK's records. According to the claims administrator, only 13 "opt out" notices had been received, of which 2 were untimely and 8 were invalid for other reasons. The Grinberg parties noted that only Stratton had filed a timely objection to the settlement, arguing that the settlement was inadequate, that the release was broader than the claims pled in the Grinberg action, and that the class notice was inadequate.

On March 8, 2012, at a fairness hearing on the settlement, the trial court deferred its ruling regarding the final approval of the settlement, and afforded Stratton an opportunity to establish that he needed to conduct discovery related to his objections.[6] Shortly afterward, on March 12, 2012, Hakim, [*8] Arter, and Altomare filed an objection to the settlement, contending that they never received timely notice of the settlement, that the settlement funds were inadequate, and that the class notice failed to disclose the existence of the consolidated Hakim action, which asserted claims under PAGA.

> 6 *Rule 3.769(g) of the California Rules of Court* provides: "Before final approval [of a proposed class settlement], the trial court must conduct an inquiry into the fairness of the proposed settlement."

C. *April 11, 2012 Hearing*

On April 11, 2012, at a fairness hearing on the settlement, attorney George Hakim appeared on behalf of Hakim, Harter, and Altomare, who were not present.[7] Because the three objectors had claimed that they never received timely notice of the settlement, the court stated that it was "troubled" whether the claims administrator had "failed in his enterprise," and suggested holding an evidentiary hearing to receive testimony from Hakim, Arter, Altomare, and the claims administrator. George Hakim agreed to the proposal.

> 7 Because George Hakim and Julian Hakim share a surname, we refer to the former by his full name.

Later in the hearing, after MIK's counsel argued that it was uncertain [*9] whether Hakim, Arter, and Altomare wished to object to the settlement or opt out, the court asked George Hakim to clarify their intentions. George Hakim replied that they "would have to opt out." The court ordered Hakim, Arter, and Altomare to file documents clearly stating their decision, and set a fairness hearing on the settlement for June 11, 2012. At the request of MIK's counsel, the court decided to place the evidentiary hearing "in abeyance," rather than conduct it on June 11, as MIK's counsel noted the possibility of a "global resolution."

D. *Vincze's Objection and MIK's Response*

On April 20, 2012, Vincze filed an objection to the settlement, contending that he never received a class notice, and thus "never had an opportunity to opt[] out, file his own lawsuit, or file a timely objection." The objection asserted that the proposed settlement funds were inadequate, and that the class notice failed to alert class members to the potential for recovery of PAGA penalties in the consolidated Hakim action.

Supporting the objection was Vincze's declaration, which stated that he was a former employee of MIK and a class member. The declaration further stated: "I only this week became aware [*10] of [the Grinberg action] and the subsequent proposed class settlement from a former co-worker. I have not received any notice of [the] class settlement since I have moved from where I resided at the time of my employment with [MIK]. However, since the time I was employed at [MIK] until now I have continuously resided in the San Fernando Valley area and I currently reside in West Hills, California."

In May 2012, Hakim, Arter, and Altomare filed an "opt out" notice regarding the proposed settlement. Later, on June 7, 2012, Daniel J. Turner, MIK's counsel, submitted a declaration in opposition to Vincze's objection. Turner stated that during May 2012, he repeatedly e-mailed George Hakim, Vincze's counsel, requesting information regarding Vincze's address when the class notices were mailed. Turner's declaration noted that Vincze's objection and supporting declaration did not state his address "during the relevant time period." Accompanying Turner's declaration were his e-mails to George Hakim, which explained that the information was needed to establish whether the class notice was sent to the correct address. According to Turner, George Hakim never provided the information, and responded [*11] only "that he was unable to get in[to] contact with his client and, therefore, could not obtain his authorization to provide his address."

E. *June 11, 2012 Hearing*

At the June 11, 2012 fairness hearing, the trial court did not rule on Vincze's objection or expressly address

whether his objection was untimely, but instead focused on other matters. The court found that Hakim, Arter, and Altomare had opted out, and determined that it was unnecessary to conduct an evidentiary hearing. The court also authorized Stratton to conduct discovery, continued the fairness hearing to August 8, 2012, and permitted Stratton and Vincze to submit further briefing in support of their objections.

F. *August 8, 2012 Hearing*

Vincze filed nothing prior to the August 8, 2012 fairness hearing, and was not present during it. George Hakim appeared on his behalf. At the hearing, the trial court overruled Stratton's objections to the proposed settlement. In addition, the court heard argument regarding whether Vincze had standing to object to the settlement.

At the hearing, the court remarked that the declarations from the claims administrator and Turner had shifted the burden to Vincze to show that he never received [*12] the class notice. The court further characterized Vincze's declaration as a "woefully [] inadequate showing," as it disclosed no information regarding Vincze's addresses. George Hakim maintained that Vincze's declaration was sufficient to establish that he never received the class notice, and stated that Vincze was out of town when Turner inquired regarding his address. George Hakim further argued that Turner had "waived" the evidentiary hearing proposed at the April 11, 2012 hearing.

In the course of the argument, the court inquired whether Vincze could appear as a witness on the following Friday. George Hakim replied, "I'll try my best," but did not describe what Vincze might say. The court then remarked: "There was a time [when] you were supposed to have or could have submitted supplemental papers. You didn't submit anything supplemental. Why didn't you use any of that time to respond to Mr. Turner's declaration . . .? [¶] It's a simple question . . . . If you got the facts on your side you should have been bringing them forward affirmatively." George Hakim replied that Turner's conduct regarding the evidentiary hearing addressing the objections from Hakim, Arter, and Altomare had [*13] induced him not to file supplemental documents regarding Vincze's objection. He stated: "I assumed when Mr. Turner waived the . . . June 11[] hearing and you agreed with him, your honor, I assumed it's a done deal. That's why I never filed anything else."

In response, the court remarked that George Hakim's reluctance to "bring [Vincze] forward" made it skeptical regarding Vincze's declaration. Noting that Vincze's declaration "provide[d] absolutely no circumstances [regarding] whether he changed his location or not," the court stated: "[H]is . . . flat conclusory assertion is not probative of anything."

Later, after MIK's counsel argued that Vincze had been given "every opportunity" to provide address information and that he "just doesn't feel . . . like giving the address," the following dialogue occurred:

"[George Hakim]: That is not correct.

"The Court: What is the address?

"[George Hakim]: I don't have it with me."

The court then ruled that Vincze's objection was untimely, stating: "[T]he court finds that the late objector failed to show good cause for the . . . late filed objection. [¶] Therefore, the court finds that he has no standing to object to the settlement and disregards the [*14] merits of his objections." In addition, the court approved the settlement in the Grinberg action.

G. *Judgment*

On September 13, 2012, the trial court entered a final judgment approving the class settlement that also referred to the August 8, 2012 ruling regarding Vincze's objection. Vincze noticed his appeal from that judgment.

DISCUSSION

Vincze attacks the judgment and the ruling regarding his objection. As explained below, he has standing on appeal only to challenge the latter. Because we find no error in that ruling, we affirm it, and dismiss the remainder of his appeal.[8]

8 At our request, the parties provided supplemental briefing regarding whether Vincze's appeal must be dismissed because he noticed it from a judgment that he lacks standing to challenge. We declined to dismiss the appeal, as the September 13, 2012 judgment refers to the August 8, 2012 ruling, which he has standing to challenge, and his notice of appeal was timely with respect to that ruling.

Regarding a related matter, the Grinberg parties contend that Vincze's appeal must be dismissed with respect to them because Vincze never served his notice of appeal on them. *Rule 8.100(a)(3) of the California Rules of Court* provides: [*15] "Failure to serve the notice of appeal neither prevents its filing nor affects its validity, but the appellant may be required to remedy the failure." No remedy is necessary here, as the Grinberg parties submitted a respondent's brief and have shown no prejudice from Vincze's failure to serve the notice of appeal on them.

A. *Scope of Appeal*

At the threshold of our inquiry, we examine the extent to which Vincze has standing to challenge the judgment and ruling regarding his objection. "[O]nly an 'aggrieved party' has a right to appeal." (*Winter v. Gnaizda (1979) 90 Cal.App.3d 750, 754.*) Standing to appeal is jurisdictional. (*Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal.App.4th 289, 295.*)

Generally, only parties of record to an action have standing to appeal. (*County of Alameda v. Carleson (1971) 5 Cal.3d 730, 736.*) "A party of record is a person named as a party to the proceedings or one who takes appropriate steps to become a party of record in the proceedings." (*In re Joseph G. (2000) 83 Cal.App.4th 712, 715.*) Under these principles, one who becomes a party to an action through a successful motion to intervene acquires standing to challenge the judgment in the action. (*Corridan v. Rose (1955) 137 Cal.App.2d 524, 528.*) [*16] Furthermore, "one who is denied the right to intervene in an action ordinarily may not appeal from a judgment subsequently entered in the case. [Citations.] Instead, he may appeal from the order denying intervention." (*County of Alameda v. Carleson, supra, 5 Cal.3d at p. 736.*)

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. (1942) 20 Cal.2d 199, 200-201.*) However, "[i]n the context of a class settlement, objecting is the procedural equivalent of intervening." (*Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 253.*) Thus, unnamed class members who file timely objections or are permitted to present their objections have standing to appeal from the judgment in the action. (*Chavez v. Netflix, Inc. (2008) 162 Cal.App.4th 43, 51* (*Chavez*); *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal.App.4th 387, 395-396* (*Consumer Cause*); *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at pp. 235-235*; *Trotsky v. Los Angeles Fed. Sav. & Loan Assn. (1975) 48 Cal.App.3d 134, 138* (*Trotsky*).)

Here, the trial court, in overruling Vincze's objection as untimely, [*17] expressly found that he had no standing to challenge the settlement, and disregarded his objection. The issues before us, therefore, concern whether he had standing on appeal to challenge the judgment or the ruling regarding his objection.

We begin with Vincze's standing to appeal from the judgment. Our research has disclosed no California decision squarely addressing that issue. However, regarding issues of standing in class actions, California courts look to federal decisions for guidance. (See *Consumer Cause, supra, 127 Cal.App.4th at pp. 395-396*; *Trotsky, supra, 48 Cal.App.3d at pp. 138-139.*) In *In re Integra Realty Res. Inc. (10th Cir. 2004) 354 F.3d 1246, 1257-1258*, the court concluded that when a class member fails to file a timely objection in accordance with the notice of the class settlement and the trial court disregards the objection, the class member lacks standing to appeal from the judgment entered pursuant to the class settlement. Additionally, in *In re UnitedHealth Group Inc. Shareholder Derivative Litigation (8th Cir. 2011) 631 F.3d 913, 917-918*, the court reached a similar conclusion regarding the standing of an unnamed shareholder who files an untimely objection [*18] to the settlement of a shareholder derivative action. We therefore conclude that Vincze lacks standing to challenge the judgment on appeal.[9]

9 Pointing to *Chavez*, Vincze suggests that an unnamed class member who files an untimely objection necessarily has standing to appeal from the judgment. We conclude that *Chavez* stands solely for the proposition that unnamed class members may acquire standing to challenge the judgment by filing *timely* objections. There, an unnamed class member filed an objection to the proposed settlement. (*Chavez, supra, 162 Cal.App.4th at p. 51.*) In addition, she submitted an untimely motion to intervene in the action, arguing that her right to appeal from the judgment would be preserved only if she were permitted to intervene. (*Ibid.*) In affirming the trial court's denial of leave to intervene, the appellate court stated that the motion to intervene had been filed after the deadline established in the class notice. (*Ibid.*) Although the appellate court did not expressly specify that the class member's objection was timely, it also concluded that the motion to intervene lacked merit, stating that "a class member who *timely* objects to a settlement has standing to [*19] appeal regardless of whether the member formally intervened in the action." (*Ibid.*, italics added.) In view of this statement, the class member appears to have filed a timely objection.

The remaining issue concerns Vincze's standing to appeal from the ruling regarding the timeliness of his objection. Generally, when a ruling "in essence" denies leave to intervene in an action, the aggrieved party may challenge it on appeal, provided that it constitutes a final determination of the party's entitlement to participate in the action. (*In re Veterans' Industries, Inc. (1970) 8 Cal.App.3d 902, 916*; see *Jun v. Myers (2001) 88 Cal.App.4th 117, 122-123.*) That requirement is satisfied here, as the trial court, in overruling Vincze's objection, expressly stated that it disregarded "the merits of his objections." Vincze thus has standing on appeal solely to

challenge the ruling regarding his objection. Accordingly, we dismiss his appeal to the extent it is taken from the judgment, and limit our inquiry to his challenges to the ruling regarding his objection. (*Braun v. Brown (1939) 13 Cal.2d 130, 133.*)

B. *Ruling Regarding Vincze's Objection*

Vincze challenges the ruling regarding his objection on two [*20] grounds. He maintains that his declaration established that he never received the class notice, and he contends that the trial court denied him due process in issuing the ruling. For the reasons discussed below, we reject both contentions.

1. *There Was Sufficient Evidence to Support the Finding that Vincze Failed to Show Good Cause for His Untimely Objection*

Vincze contends the trial court erred in finding that he did not show good cause for his untimely objection, maintaining that his declaration established that he never received the class notice. We disagree.

Generally, we review the trial court's factual determinations for the existence of substantial evidence. (*Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874.*) In this regard, "the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact]." (*Ibid.*, italics omitted.) Under these principles, we will affirm a factual finding predicated on the trial court's rejection of a witness's testimony, "unless it appears that there are no matters or circumstances [that] . [*21] . . impair the accuracy of the testimony . . . ." (*La Jolla Casa de Manana v. Hopkins (1950) 98 Cal.App.2d 339, 345.*) Furthermore, when the underlying evidence consists of declarations, the rule applicable to our review "is the same as that governing oral testimony . . . ." (*Hammel v. Lindner (1964) 224 Cal.App.2d 426, 431-432.*)

Under these principles, a trial court may properly decline to credit statements in a declaration, even though the adverse showing does not directly challenge those statements. In *Tom Thumb Glove Co. v. Han (1978) 78 Cal.App.3d 1, 3-4* (*Tom Thumb Glove Co.*), a supplier of hand gloves obtained a judgment against a retailer in North Carolina, and initiated an action in California for an enforceable judgment predicated on it. After the enforceable judgment was entered, the retailer sought to have it vacated, contending that the North Carolina judgment was secured through extrinsic fraud. (*Ibid.*) In support of the contention, the retailer and his counsel submitted declarations stating that during the North Carolina proceedings, the supplier's counsel assured them that no judgment would be entered in North Carolina or California. (*Id. at pp. 4-5.*) Although the responsive [*22] declaration from the supplier's counsel was silent regarding the purported assurances, the trial court denied the motion to vacate. (*Id. at p. 4.*)

In affirming the ruling on the motion to vacate, the appellate court held that the trial court had a reasonable basis for declining to credit the declarations from the retailer and his counsel. (*Tom Thumb Glove Co., supra, 78 Cal.App.3d at p. 6.*) Noting that "'there may be so many omissions in [a declarant's] account . . . as to discredit his whole story,'" the appellate court identified significant gaps in the declarations, including the failure of the retailer's counsel to memorialize the purported assurances in writing. (*Id. at p. 5*, quoting *La Jolla Casa de Manana v. Hopkins, supra, 98 Cal.App.2d at pp. 345-346.*) The court thus concluded that the declarations were sufficiently "cryptic and unenlightening" to support the trial court's determination. (*Tom Thumb Glove Co., supra, at p. 6.*)

A similar issue is presented here. Regarding the circumstances underlying Vincze's purported failure to receive the class notice, his declaration merely stated: "I have not received any notice of [the] class settlement since I have moved from where I resided [*23] at the time of my employment with [MIK]. However, since the time I was employed at [MIK] until now I have continuously resided in the San Fernando Valley area and I currently reside in West Hills, California." Turner's responsive declaration did not directly contradict Vinczes's claim that he never received the class notice, but effectively identified two key omissions in Vincze's evidentiary showing. First, although Vincze maintained that he never received the class notice because he had moved from the address in MIK's records, he did not state when he moved from that address or where he was living when the class notice was mailed. Second, George Hakim had not provided that information, despite Turner's repeated requests. At the August 11, 2012 hearing, after noting that the claims administrator had submitted evidence that the class notices were mailed to the addresses known to MIK, the trial court declined to credit Vincze's declaration, stating that his "flat[,] conclusory assertion is not probative of anything."

In view of *Tom Thumb Glove Co.*, we find no error in the trial court's determination that Vincze's declaration was not credible. As discussed further below (see pt. B.2, *post*), [*24] the evidence before the court showed that Vincze and his counsel repeatedly declined to provide information critical to the assessment of Vincze's claim that he never received the class notice, including when he moved from the address known to MIK and where he resided when the class notices were mailed. Accordingly, there is substantial evidence to support the trial court's

finding that Vincze failed to show good cause for his untimely objection.

2. *There Was No Denial of Notice and an Adequate Opportunity to Present Evidence*

Vincze contends that the trial court abused its discretion "by ruling, without a duly noticed hearing and an opportunity for counsel to prepare and be heard, that [his] objections were untimely." He argues that the trial court never expressly stated that it intended to address his objection at the August 8, 2012 hearing, and instead induced George Hakim to believe that MIK's challenge regarding the objection was resolved at the June 11, 2012 hearing. He thus contends that the court conducted a "surprise evidentiary hearing" on MIK's challenge at the August 8 hearing. (Italics omitted.) He further argues that at the August 8 hearing, the trial court was obliged to [*25] order an evidentiary hearing or afford him an opportunity to submit further evidence before ruling on MIK's challenge.

a. *Adequate Notice*

To begin, we conclude that at the June 11 hearing, Vincze received adequate notice that issues related to his objection would be addressed at the August 8 hearing, including MIK's challenge to the objection. Prior to the June 11 hearing, Vincze filed his objection and supporting declaration, and Turner submitted his responsive declaration. MIK's challenge to Vincze's declaration was thus pending at the June 11 hearing. However, at the June 11 hearing, the trial court made no rulings regarding Vincze's objection. Instead, it continued the fairness hearing to August 8, asked Vincze to submit any further briefs regarding his objection by July 19, and permitted MIK to file a response by July 26. In our view, the trial court's briefing schedule provided Vincze with adequate notice that he should expect to address MIK's challenge at the August 8 hearing.

Nor did the trial court or MIK's counsel engage in any conduct at the June 11 hearing that George Hakim could have reasonably viewed as resolving MIK's challenge to Vincze's declaration. Vincze argues that [*26] because the court ruled at the June 11 hearing that an evidentiary hearing regarding Hakim's, Harter's and Altomare's objections was no longer necessary, and MIK did not object to this ruling, George Hakim reasonably inferred "that the court was satisfied that [Vincze] did not receive [the class notice]." We disagree.

The trial court ordered the evidentiary hearing regarding Hakim's, Harter's and Altomare's objections at the April 11, 2012 hearing, *before* Vincze filed his objection. The evidentiary hearing was thus aimed at potential issues regarding the mailing of the class notice raised by Hakim's, Harter's, and Altomare's objections. At the June 11 hearing, the court found that Hakim, Arter, and Altomare had opted out, and determined that it was unnecessary to conduct an evidentiary hearing at which the claims administrator would appear as the sole witness. In so ruling, the court remarked that because "teens and young adults" were now "highly mobile," the fact that they moved from their parent's home and failed to "methodically check their snail mail . . . doesn't prove there was any problem with the [claims administrator's] notice . . . ."

Nothing in the court's ruling or remarks [*27] reasonably constituted a ruling on MIK's challenge to Vincze's objection, and nothing in MIK's conduct reasonably suggested that it had abandoned its challenge. Because Hakim, Harter, and Altomare decided to opt out prior to the June 11 hearing, it is unsurprising that the court decided the evidentiary hearing was no longer necessary, and that MIK did not contest that determination. Furthermore, the court's remarks cannot reasonably be interpreted as addressing MIK's challenge to Vincze's objection, as the court made no reference to that objection or MIK's challenge to it. Additionally, we note that the court, in ruling that the evidentiary hearing was unnecessary, stated that it had no concerns regarding the adequacy of the claim administrator's conduct that warranted an evidentiary hearing. These remarks cannot reasonably be viewed as suggesting that the court found that Vincze did *not* receive the class notice. In sum, Vincze had adequate notice that MIK's challenge to his objection would be addressed at the August 8 hearing.

b. *Adequate Opportunity to Present Evidence*

We further conclude that Vincze was afforded an adequate opportunity to present evidence to meet MIK's challenge, [*28] as the trial court directed him at the June 11 hearing to submit any additional briefs he wished prior to the August 11 hearing. Generally, trial courts are authorized to resolve motions and similar matters upon the basis of declarations. (*Reifler v. Superior Court (1974) 39 Cal.App.3d 479, 483-485*; *Code Civil Proc. § 2009.*)

At the June 11 hearing, the trial court permitted Vincze to submit additional declarations or other documentary evidence by July 19 to support his original declaration. As George Hakim neither objected to the court's procedural rulings nor requested an evidentiary hearing, Vincze has forfeited any contention that the court erred at the June 11 hearing in determining that the matter was properly resolved upon declarations alone. (*Redevelopment Agency v. City of Berkeley (1978) 80 Cal.App.3d 158, 166* [appellant forfeits the right to attack error by expressly or impliedly agreeing at trial to the pertinent procedure].) Furthermore, because the court allowed

Vincze more than six weeks to make a supplemental showing, he was given an adequate opportunity to do so.

Vincze contends that at the August 11 hearing, the trial court was obliged to set an evidentiary hearing or [*29] permit him to submit additional evidence, even though George Hakim never expressly asked for an evidentiary hearing or a continuance to secure more evidence. Vincze argues that George Hakim's willingness to provide him as a witness was sufficient to mandate an evidentiary hearing or a continuance. We disagree.

Generally, the trial court has "broad discretion" to resolve an issue "on the basis of declarations and other documents[,] rather than live, oral testimony." (*California School Employees Assn. v. Del Norte County Unified Sch. Dist. (1992) 2 Cal.App.4th 1396, 1405.*) As our Supreme Court has explained, "[t]here is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony." (*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 414.*) Ordinarily, a party seeking an evidentiary hearing must provide an offer of proof specifying the evidence to be presented. (See *Cal. Rules of Court, rule 3.1306(b)* [in requesting evidentiary hearing, party is obliged to state "the nature and extent of the evidence proposed to be introduced."].)

A request for a [*30] continuance also is consigned to the trial court's discretion. Generally, "[t]here is no policy in this state of indulgence or liberality in favor of parties seeking continuances. Rather, the granting of continuances is not favored and the party seeking a continuance must make a proper showing of good cause. [Citations.]" (*Foster v. Civil Service Com. (1983) 142 Cal.App.3d 444, 448.*)

In view of these principles, the trial court did not abuse its discretion in refraining from ordering an evidentiary hearing or a continuance to permit Vincze to submit additional evidence. At the August 11 hearing, George Hakim made no offer of proof regarding the testimony that Vincze would provide regarding when he moved from the address known to MIK or where he lived when the class notices were mailed. Indeed, when the court pressed George Hakim for this information, he was unable to provide it, even though MIK had raised its challenge to Vincze's declaration over two months before the August 11 hearing. As George Hakim failed to state good cause for an evidentiary hearing or a continuance and requested neither, the trial court was not required to order either of them. In sum, we find no error in the [*31] trial court's ruling regarding Vincze's untimely objection.

DISPOSITION

The trial court's order overruling Vincze's objection as untimely is affirmed. Vincze's appeal from the judgment approving the class settlement is dismissed. Respondents are awarded their costs on appeal.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.

ANGEL ALONZO et al., Plaintiffs and Respondents, v. FIRST TRANSIT, INC., Defendant and Respondent; ERIC P. CLARKE, Movant and Appellant.

B253699

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SEVEN

2015 Cal. App. Unpub. LEXIS 7415

October 15, 2015, Opinion Filed

PRIOR HISTORY: [*1] APPEAL from an order and a judgment of the Superior Court of Los Angeles County, No. BC433932, Elihu M. Berle, Judge.

DISPOSITION: Order affirmed, judgment reversed.

COUNSEL: Law Offices of Mark Yablonovich, Mark Yablonovich, Patrick J. Clifford, and Joseph Hoff for Movant and Appellant.

Sundeen Salinas & Pyle, Hunter Pyle and Mana Barari for Plaintiffs and Respondents.

Littler Mendelson, Theodore R. Scott and David J. Dow for Defendant and Respondent.

JUDGES: SEGAL, J.; ZELON, Acting P. J., STROBEL, J.* concurred.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: SEGAL, J.

OPINION

INTRODUCTION

Plaintiffs, a group of drivers employed by defendant First Transit, Inc., filed a class action alleging various wage and hour claims. Eric P. Clarke was a member of the class, but he opted out several months after the trial court certified the class. Plaintiffs and First Transit subsequently reached a settlement that resolved the wage and hour claims as well as claims under the Private Attorneys General Act (PAGA) (*Lab. Code, § 2699*).[1]

1 All undesignated statutory references are to the Labor Code.

Shortly before the hearing on final approval of proposed settlement, Clarke filed [*2] an ex parte application for leave to intervene. The court denied Clarke's ex parte application, gave final approval to the settlement agreement, and entered a stipulated judgment under *Code of Civil Procedure section 664.6*. Clarke appeals from the order denying his ex parte application for leave to intervene and the judgment entered after the court approved the settlement. We affirm the order denying intervention, but we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Clarke's Employment*

First Transit, a private contractor that provides bus and other public transit services throughout California, hired Clarke in February 2000 to drive bus routes in Los Angeles. First Transit assigned Clarke to the bus routes associated with its Community Downtown Area Short Hop (DASH) Package 6. Clarke drove buses on DASH Package 6 routes between February 2000 and June 2006.

First Transit terminated his employment in February 2007.

B. *The Class Action*

In March 2010 plaintiffs filed a class complaint alleging that First Transit had violated Labor Code provisions governing rest breaks (*§ 226.7*), wage statements (*§ 226*), and the payment of compensation after an employee is discharged or resigns (*§§ 201*, *202*, & *203*). The complaint also alleged violation of [*3] the Unfair Competition Law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*).

The second amended complaint defined the class as follows: "All bus operators that worked for FIRST TRANSIT, driving bus routes associated with Community DASH Packages 2 and/or 6 in Los Angeles County, at any time during the Class Period in unit(s) represented for purposes of collective bargaining by Teamsters Local Union 572." The "Class Period" included members of the class who worked for First Transit on or after August 13, 2003.

In July 2012 the trial court certified the class defined in the second amended complaint. Clarke was a member of the class, but he opted out in October 2012.

In February 2013 the parties, after having conducted discovery, participated in mediation and reached a settlement agreement.[2] In June 2013 the trial court preliminarily approved a revised settlement agreement. Pursuant to this agreement, plaintiffs agreed to amend the complaint to add a claim for statutory penalties under PAGA. First Transit agreed to pay $2 million to settle the plaintiffs' class claims, $10,000 of which First Transit agreed to pay to the California Labor and Workforce Development Agency to settle the PAGA claims. The settlement agreement distributed [*4] no portion of the $10,000 allocated to the PAGA claims to the aggrieved employees. The court set the final approval hearing for October 8, 2013.

> 2 Counsel for Clarke had participated in an earlier mediation session but was excluded from the February 2013 session.

Following the trial court's preliminary approval, the class representatives provided notice of the settlement to the class members. The class members had until September 8, 2013 to submit claims. By that date, 350 members had submitted claims, which accounted for 83 percent of the $2 million allotted by the settlement. None of the class members objected to the proposed settlement.

On September 11, 2013 plaintiffs filed a third amended complaint adding the PAGA claims. The PAGA claims sought civil penalties for First Transit's Labor Code violations and restitution for the UCL violations.

On October 2, 2013 Clarke filed an ex parte application for leave to intervene. Clarke asserted that he was entitled to intervene because, among other reasons, he had an interest in the parties' resolution of the PAGA claims, which he claimed the parties had drastically undervalued, and the parties had colluded in reaching the proposed settlement. [*5]

On October 8, 2013 the trial court heard Clarke's ex parte application. When questioned by the court about why he had waited until less than a week before the final approval hearing to file an ex parte application for leave to intervene, counsel for Clarke admitted that he became aware in late July 2013 that the parties were settling the PAGA claims. Counsel for Clarke explained that he had not sought intervention earlier because he had first sought unsuccessfully to enjoin the settlement in a separate lawsuit he had previously filed against First Transit.[3]

> 3 In August 2007 Clarke filed a class complaint against First Transit in Los Angeles Superior Court. First Transit removed the case to federal district court. In 2010 the district court dismissed the case because Clarke's claims were barred by the statute of limitations. In January 2008 Clarke filed a second lawsuit against First Transit in Los Angeles Superior Court. In the second lawsuit, Clarke sought only civil penalties under PAGA for the same conduct alleged in his first lawsuit. In February 2009 the court stayed the second lawsuit. In September 2013 Clarke sought an order lifting the stay in the second lawsuit so that he could [*6] obtain an injunction to enjoin the parties from finalizing the class action settlement in this action.

On the merits of the application, Clarke argued that he had a sufficient interest to intervene because the settlement of the PAGA claims would collaterally estop him from bringing his PAGA claims. He claimed that the parties had settled the PAGA claims with the intent to prevent him from pursuing his PAGA claims.

The trial court denied Clarke's ex parte application as untimely. The court stated that Clarke had failed to justify why he waited until less than a week before the final approval hearing to seek intervention. The court also found that Clarke had failed to demonstrate that his interest in intervening outweighed the parties' interests in settling the lawsuit. The court reasoned that Clarke's decision not to rejoin the class after the parties had reached a settlement and his considerable delay in seeking to intervene after learning about the parties' intention of

settling the PAGA claims demonstrated that his interest did not outweigh the interests of the parties in settling the case.

After denying Clarke's ex parte application, the court approved the settlement. The court found [*7] that the parties had conducted sufficient discovery to inform their negotiations, and that they had conducted their negotiations in good faith and at arm's length. The court also found that the value of the settlement was reasonable and adequate because it exceeded First Transit's maximum exposure on the Labor Code and UCL claims. The court also found that the attorneys for the class had given proper notice to the class members, and the court approved $666,666 in attorneys' fees for class counsel and $66,233.70 in costs. Clarke appeals from the trial court's order denying his ex parte application for leave to intervene and from the judgment giving final approval of the settlement agreement.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying Clarke's Ex Parte Application for Leave To Intervene*

Clarke argues that the trial court abused its discretion in denying his ex parte application for leave to intervene as untimely because he sought intervention soon after plaintiffs filed their amended class action complaint to allege the PAGA claims. Because Clarke unreasonably delayed in seeking intervention, the trial court properly denied his application.

Code of Civil Procedure section 387 allows a nonparty to [*8] intervene in a lawsuit under certain circumstances. Intervention may be mandatory or permissive depending on the nature of the nonparty's interest in the litigation. (See *Code Civ. Proc., § 387*; *Siena Court Homeowners Assn. v. Green Valley Corp. (2008) 164 Cal.App.4th 1416, 1423-1428.*) A nonparty has an unconditional right to intervene where the nonparty has an interest in the property or transaction underlying the litigation that may be impaired by resolution of the action and the existing parties do not adequately protect that interest. (*Siena Court Homeowners Assn. v. Green Valley Corp., supra, 164 Cal.App.4th at pp. 1423-1424.*) A nonparty may also have a mandatory right to intervene where authorized by statute. (See *Code Civ. Proc., § 387, subd. (b)* [court must allow a nonparty to intervene "[i]f any provision of law confers an unconditional right to intervene"].) Intervention is permissive where the person seeking to intervene has an interest in the subject matter of the litigation or an interest in common with, or in opposition to, the parties to the lawsuit. (*Code Civ. Proc., § 387, subd. (a).*) The nonparty's interest "must be direct rather than consequential, and it must be an interest that is capable of determination in the action." (*Royal Indem. Co. v. United Enterprises, Inc. (2008) 162 Cal.App.4th 194, 203-204.*)[4]

4 Clarke did not specify whether he was seeking mandatory or permissive intervention.

Whether the nonparty is seeking mandatory or permissive intervention, the application to intervene must be timely. (*Code Civ. Proc., § 387*; see *Marken v. Santa Monica-Malibu Unified School Dist. (2012) 202 Cal.App.4th 1250, 1277.*) [*9] Even where a nonparty has an unconditional right to intervene, the court may deny the application if it is untimely. (*Marken, supra, 202 Cal.App.4th at p. 1277.*) Although there is no statutory time limit on seeking intervention, an unreasonable delay in filing an application for leave to intervene is a proper ground for denying the application. (See *ibid.* ["'it is the general rule that a right to intervene should be asserted within a reasonable time and the intervener must not be guilty of an unreasonable delay after knowledge of the suit'"]; *Noya v. A.W. Coulter Trucking (2006) 143 Cal.App.4th 838, 842* [court did not abuse its discretion by denying nonparty insurer's application as untimely where the insurer knew the litigation had been ongoing for several years and did not seek to intervene until after the parties had reached a settlement].) "An order denying intervention is reviewed under the deferential abuse-of-discretion standard." (*Noya, supra, 143 Cal.App.4th at p. 842.*)

Although the trial court denied his application as untimely, Clarke devotes little argument on appeal to the issue of timeliness. Clarke contends that he did not discover that the parties were going to settle the PAGA claims until plaintiffs filed the third amended complaint on September 11, 2013, about three weeks before he filed his ex parte application. [*10] He argues that his ex parte application was timely because he filed it "shortly" thereafter.

As his attorney admitted at the hearing on his application, however, Clarke knew in July 2013 that the parties intended to settle the PAGA claims. Clarke also knew or reasonably should have known in June 2013 that the parties intended to settle the PAGA claims because by then the court had preliminarily approved the settlement agreement and set a hearing date for final approval. Yet Clarke did not attempt to intervene until October 2013, several weeks after the deadline for class members to submit claims under the settlement agreement. Clarke did not provide a satisfactory explanation for why he waited to seek intervention until more than three months after preliminary approval of the settlement, more than two months after admittedly learning the settlement would include the PAGA claims, nearly one month after the deadline for class members to submit claims, and less

than one week before the hearing on final approval of the settlement. The trial court did not abuse its discretion in denying Clarke's eleventh-hour request to intervene.

B. *Clarke Has Standing To Appeal from the Judgment*

Plaintiffs [*11] and First Transit argue that Clarke lacks standing to appeal from the judgment giving final approval to the settlement agreement because he is not a party to the action and he did not object to the settlement agreement or file a motion to vacate the judgment. Clarke argues that, despite the trial court's denial of his ex parte application for leave to intervene, he has standing to challenge the judgment because resolution of the PAGA claims in this action will bar the PAGA claims alleged in his lawsuit.

A person must have standing to appeal from an order or a judgment. (*Conservatorship of Gregory D. (2013) 214 Cal.App.4th 62, 67.*) Generally, a person must be a party of record and aggrieved by the challenged judgment to have standing. (*Code Civ. Proc., § 902*; *Bridgeman v. Allen (2013) 219 Cal.App.4th 288, 292.*) A nonparty may have standing to appeal, however, where "a judgment or order has a res judicata effect on the nonparty." (*In re Clergy Cases I (2010) 188 Cal.App.4th 1224, 1233*; see *Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal.App.4th 289, 295* ["'[a] person who would be bound by the doctrine of res judicata, whether or not a party of record, is . . . [entitled] to appeal'"].) Clarke has standing to appeal the judgment because under *Arias v. Superior Court (2009) 46 Cal.4th 969* (*Arias*) the settlement agreement will preclude him from pursuing his PAGA claims.

In *Arias*, the California Supreme Court decided whether a representative PAGA claim must satisfy class action [*12] requirements. (*Arias, supra, 46 Cal.4th at pp. 981-987.*) The defendant employer in that case argued that PAGA claims had to satisfy class action requirements because to allow employees to file separate PAGA lawsuits would unfairly subject employers to open-ended litigation or "one-way intervention." (*Arias, at p. 985.*) The defendant in *Arias* argued that, if class action requirements did not apply to PAGA claims, individual employees aggrieved by the same conduct could file successive lawsuits until one employee obtained a favorable judgment, after which all other aggrieved employees could use the favorable judgment to bind the defendant in their lawsuits. (*Ibid.*)

The Supreme Court rejected the defendant's arguments and held that PAGA claims need not satisfy class action requirements. (*Arias, supra, 46 Cal.4th at pp. 984-987.*) The Supreme Court explained that, because an aggrieved employee suing under PAGA acts as the agent of the state's labor law enforcement agencies, and because the state's agencies represent the interests of all aggrieved employees, all nonparty aggrieved employees are in privity with an employee suing under PAGA and therefore are bound by the employee's PAGA judgment. (*Arias, at p. 986.*) Thus, under *Arias*, a judgment in a PAGA action brought by a single employee, [*13] or a group of employees, precludes all aggrieved employees who were not named in that action from later bringing PAGA claims against the same defendant. (See *Arias, at p. 986* ["nonparty employees as well as the government are bound by the judgment in an action brought under [PAGA]"]; accord, *Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348, 380* (*Iskanian*).) Such a judgment does not, however, preclude nonparty aggrieved employees from pursuing remedies other than civil penalties based on the same underlying Labor Code violations. (*Arias, 46 Cal.4th at p. 986*; see *Baumann v. Chase Inv. Servs. Corp. (9th Cir. 2014) 747 F.3d 1117, 1123* ["'nonparty employees, because they were not given notice of the action or afforded an opportunity to be heard, are not bound by the judgment as to remedies other than civil penalties'"].)

Clarke was employed by First Transit throughout the period covering the Labor Code violations that are the bases of the PAGA claims in this action. During that period, Clarke, like members of the class, drove buses on First Transit's DASH Package 6 routes. In his proposed complaint in intervention, Clarke alleges that he was subject to the same Labor Code violations as the class members who were working the DASH Package 6 routes at the same time. Thus, Clarke's PAGA claims seek to collect the same civil penalties that plaintiffs' [*14] PAGA claims seek to collect in this action. Thus, the judgment in this action will bar the PAGA claims alleged in Clarke's action. (See *Arias, supra, 46 Cal.4th at p. 986.*)

Citing to language in the court's opinion in *Villacres v. ABM Industries Inc. (2010) 189 Cal.App.4th 562* (*Villacres*), plaintiffs and First Transit argue that the settlement agreement will not preclude Clarke from pursuing his separate PAGA claims against First Transit. In *Villacres* the plaintiff, who was a member of a class of security guards in a prior lawsuit involving Labor Code claims against his former employer, filed a separate PAGA action against the same employer after the prior class action had settled. (*Villacres, at p. 573.*) The settlement agreement in the prior class action contained a provision releasing the employer from "any and all claims" that could have been asserted against it arising out of the same conduct underlying the Labor Code claims of the class. (*Villacres, at p. 572.*) The settlement agreement did not mention PAGA penalties. (See *Villacres, at pp. 570-573.*) The plaintiff in *Villacres* did not opt out of the prior class, object to the settlement

agreement in the prior class action, or attempt to intervene in the prior class action to assert his PAGA claims. (*Villacres, at p. 574.*)

The trial court in *Villacres* granted the defendant [*15] employer's motion for summary judgment because the class action settlement in the prior lawsuit, which bound the plaintiff, barred his PAGA claims under the doctrine of res judicata. (*Villacres, supra, 189 Cal.App.4th at p. 574.*) The Court of Appeal affirmed. The court explained that, in the prior class action, the plaintiff had received notice of the class settlement and did not object to the settlement, seek to intervene in the class action to preserve his PAGA claims, or opt out of the class action to pursue his PAGA claims independently. (*Villacres, at pp. 581-582.*) Because the class settlement released the defendant employer from liability for any and all claims that could have been raised based on the employer's conduct, and because the plaintiff's PAGA claims arose out of that conduct, the plaintiff's participation in the class settlement barred him from later seeking additional penalties based on the same conduct by the employer. (*Villacres, at pp. 582-587.*) As part of its analysis, the Court of Appeal noted, in dicta and without citing *Arias*, that the plaintiff in the subsequent class action "could have easily preserved his PAGA claims by opting out of the class" in the prior class action. (*Villacres, at p. 583.*) Plaintiffs and First Transit argue that this [*16] language demonstrates that Clarke will not be bound by their settlement agreement because Clarke opted out of the class.

Villacres is distinguishable. Unlike the plaintiffs in this case, the plaintiffs in *Villacres* never pleaded or sought recovery for any PAGA claims. (See *Villacres, supra, 189 Cal.App.4th at p. 572.*) Thus, in *Villacres*, the trial court did not enter a judgment on any PAGA claims after it had given final approval to the settlement agreement. In addition, the court in *Villacres* stated that the plaintiff's PAGA claims were barred by res judicata because the plaintiff had participated in the prior class action, and that, had the plaintiff opted out of the class in the prior lawsuit, the terms of the class settlement would not have barred his PAGA claims. (See *Villacres, at pp. 581-582.*) The court in *Villacres*, however, did not discuss whether *Arias* would have barred the plaintiff's PAGA claims if he had opted out of the class in the prior lawsuit. (See *Villacres, at pp. 578-593.*) And, to the extent plaintiffs and First Transit urge us to extend the dicta from the *Villacres* opinion to the facts of this case, we are bound by the Supreme Court's contrary holding in *Arias*. (See *Arias, supra, 46 Cal.4th at p. 985* ["the judgment in [a PAGA action] is binding not only on the named employee [*17] plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding"].) Because under the Supreme Court's decision in *Arias* the settlement of the PAGA claims in this action will bar the PAGA claims in Clarke's action, Clarke has standing to appeal from the judgment.

C. *The Judgment Must be Reversed to Allow the Trial Court to Comply with Section 2699*

Clarke argues that the trial court erred in approving the provision of the settlement agreement resolving the PAGA claims because (1) the settlement agreement does not allocate 25 percent of the civil penalties to the aggrieved employees, as required by *section 2699, subdivision (i)*; (2) there is no evidence in the record that the court specifically reviewed and approved the civil penalties allocated to the PAGA claims, as required by *section 2699, subdivision (l)*; (3) plaintiffs and First Transit colluded in settling the PAGA claims; and (4) the settlement agreement contravenes PAGA's purpose of deterring employers from committing Labor Code violations because it significantly undervalues the PAGA claims. (See *Montano v. Wet Seal Retail, Inc. (2015) 232 Cal.App.4th 1214, 1223* ["PAGA was clearly established . . . to deter [Labor Code] violations"].) We agree with Clarke's first two arguments (and do not reach the second two).

Section 2699, subdivision (i), provides that [*18] civil penalties recovered under PAGA "shall be distributed" 75 percent to the Labor and Workforce Development Agency and 25 percent to the aggrieved employees, which includes "all employees affected by the Labor Code violation[s]." (*Iskanian, supra, 59 Cal.4th at p. 382.*) The settlement agreement, however, allocates 100 percent of the $10,000 in PAGA civil penalties to the Labor Workforce Development Agency. Plaintiffs and First Transit do not address this misallocation of the PAGA penalties in their briefs, although at oral argument counsel for plaintiffs admitted that the agreement's failure to distribute 25 percent of the civil penalties to the employees aggrieved by the Labor Code violations was an "oversight." Thus, there is no dispute the agreement fails to comply with PAGA's distribution requirements.

In addition, under *section 2699, subdivision (l)*, the trial court must "review and approve any penalties sought as part of a proposed settlement agreement pursuant to [PAGA]." In its order approving the settlement agreement, the court summarized the material terms of the agreement, and noted that the agreement included a provision settling the PAGA claims. The court's analysis of the settlement terms and description of the settlement process, however, do [*19] not address the sufficiency of the $10,000 allocated to the PAGA claims. Rather, the court's analysis and comments at the final approval hearing are devoted entirely to whether the gross amount of the settlement is fair under the standards governing class action settlements, and whether the class members received proper notice of the settlement. PAGA claims,

however, are not subject to or governed by class action rules and requirements. (See *Arias, supra, 46 Cal.4th at pp. 980-987.*) Therefore, we cannot infer, as plaintiffs ask us to infer, that the court's analysis of the gross amount of the settlement under class action standards necessarily indicates that the court separately reviewed and approved the settlement of the PAGA claims. (See *Baumann v. Chase Inv. Servs. Corp., supra, 747 F.3d at p. 1124* [class actions and PAGA claims "are more dissimilar than alike" because a "PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief"].) Indeed, the fact that the court overlooked the agreement's failure to allocate 25 percent of the PAGA penalties to the aggrieved employees, as required by *section 2699, subdivision (i)*, strongly suggests that the court did not separately review and approve the PAGA portion of the agreement. We therefore [*20] remand the matter and direct the court to review the agreement's provision settling the PAGA claims and ensure that any approved settlement of the PAGA claims complies with *section 2699, subdivision (i).*

DISPOSITION

The order denying Clarke's ex parte application for leave to intervene is affirmed. The judgment is reversed and the matter remanded to the trial court to conduct a new hearing for final approval of the settlement agreement in compliance with the requirements of *section 2699, subdivisions (i)* and *(l)*. The trial court is directed to allow Clarke to participate in the final approval hearing for the purpose of contesting the settlement of the PAGA claims. Each party is to bear its costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

STROBEL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*