S178320
2nd Civil No. **B204943**

IN THE

SUPREME COURT

STATE OF CALIFORNIA

IN RE BAYCOL CASES I AND II

AFTER ORDER BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,
ON APPEAL FROM THE SUPERIOR COURT FOR LOS ANGELES COUNTY
HONORABLE WENDELL MORTIMER, JR., JUDGE
LASC Case Nos. JCCP 4217 and JCCP 4223

PETITIONER'S REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Respondent asserts three arguments against review, none of which are meritorious. Respondent argues that because the Court of Appeal's decision is unpublished, it will not have far reaching, undesirable consequences. As discussed below, this Court reviews a considerable number of unpublished decisions. That the decision at issue here broadly impacts both superior and appellate court jurisdiction which may result in serious consequences to parties seeking appeal, as well as potential malpractice liability for practitioners (and a multitude of protective appeals to avoid such liability), strongly favors review.

Respondent also argues that review is unwarranted because the length of delay between the grant of demurrer and the entry of judgment in the present case was unusually long. Given the administrative priority of orders over judgments, however, many cases see large gaps between entry of a demurrer and the resulting judgment, and such delays may be even more likely in the current environment of judicial backlog and furlough. Regardless, even if the delay between order and judgment is one day, the fact remains that there is considerable consequence to an appeal filed on Day 61 instead of Day 60. Given the jurisdictional and dispositive nature of the appeal deadline, it is vital to know to a certainty whether the 60-day period to appeal begins on the date of entry of final judgment.

Finally, Respondent contends that the Court of Appeal was correct on the merits of its decision. Petitioner respectfully disagrees for each of the reasons discussed at length in the Petition for Review and those further discussed throughout the brief below.

In summary, the systemic significance of the Court of Appeal's holding and its implications for both appellate review and divestiture of trial court jurisdiction amply warrant this Court's review.

ARGUMENT

I. THE COURT OF APPEAL'S DECISION HAS FAR REACHING CONSEQUENCES REQUIRING REVIEW REGARLDESS OF PUBLICATION

Despite Respondent's contention that the Court of Appeal was correct on the merits (discussed *infra*), Respondent concedes that the proper resolution of this merits dispute affects appellate review of every class action subject to a demurrer, and potentially every other case in which the complaint contains—as most do—a request for provisional relief subject to interlocutory appellate review (*e.g.*, an injunction). Respondent further does not dispute that the holding of the Court of Appeal below will result in protective (unnecessary) appeals as well as divest trial courts of the authority to grant meritorious and efficacious post-demurrer requests; *e.g.*, motions for reconsideration. Given the importance of the issues at stake, and their widespread applicability, this Court's review is amply warranted.

The impact of the Court of Appeal's decision exists whether it is published or not and, indeed, a substantial portion of this Court's merits docket consists of precisely such unpublished cases. Review of such cases is particularly appropriate where, as here, the decision below involves a procedural timeliness bar, and even more so where, as here, that bar is jurisdictional. The Court of Appeal squarely held that it lacks jurisdiction whenever 60 days has elapsed after the grant of a demurrer, even if no judgment has been entered. Any attorney who fails to heed this holding, even if it requires a premature and unnecessary appeal, risks not only a compelled jurisdictional dismissal, but also the specter of potentially

massive malpractice liability. That this decision is unpublished matters not; because the consequences of dismissal are so severe, counsel must be conservative and file their appeal by the *earliest possible* deadline articulated by the Court of Appeal. This results in precisely the adverse consequences identified in the Petition for Review. Review of such decisions is vital, and even more so if—as Respondent strenuously contends in its Opposition—this holding is allegedly part of a "long line" of cases that so hold.

Moreover, as a practical matter, this dynamic only heightens, rather than reduces, the need for this Court's review. Jurisdictional timeliness bars are one-way ratchets: once established, in practice, sage counsel follow these holdings, and the decision to do so effectively precludes future review by this Court. When the Court of Appeal holds, as here, that an appeal must be filed within 60 days of X (*e.g.*, the grant of a demurrer), rather than the later Y (*e.g.*, entry of judgment), counsel will do so, even if this prevents them from filing meritorious and efficacious prejudgment motions. Unless corrected by this Court promptly, a holding such as the Court of Appeal's here is largely insulated from review because the filing of premature (but timely) appeals creates the pernicious systemic consequences identified in the Petition for Review, but the timeliness of these early appeals means that parties will rarely be in a position to raise a timeliness challenge in this Court to this *de facto* regime. These systemic consequences thus strongly militate in favor of this Court's review of the Court of Appeal's express and unambiguous holding below.

II. THE LENGTH OF TIME BETWEEN ENTRY OF AN ORDER AND ENTRY OF THE FINAL JUDGMENT IS NOT MATERIAL TO THIS COURT'S DECISION TO GRANT REVIEW, BUT THE FACT THAT A GAP WILL OCCUR IN MOST CASES SUPPORTS REVIEW

Respondent also asserts that review is unwarranted because the length of the delay between the grant of the demurrer and the entry of judgment in the present case was unusually long. But *many* cases see a large gap between those two events, not only generally (given the differential administrative responsibilities often assigned to orders as opposed to judgments), but particularly in this era of judicial furloughs and backlog. More importantly, the Court of Appeal's holding makes critical even a gap of a *single day*, since there is a considerable—indeed, jurisdictional—difference between an appeal filed on Day 61 as opposed to Day 60. In addition, the number of cases in which the judgment is administratively entered on the *same day* a demurrer is granted is not only low, but even for those few cases, the rule advanced by Petitioners would still obtain all of the advantages of the bright-line final judgment rule. Under the Court of Appeal's rule, however, multiple, divergent, and often concurrently running deadlines will be the norm.[1]

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[1] Respondent argues that "[l]ong ago, this Court concluded that the risk of multiple appeals in class cases was outweighed by the importance of the right to obtain immediate review of orders dismissing class claims," citing *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695. (Answer at 8). This is a misstatement of *Daar* and ignores the practical realities of class litigation. *Daar* endorsed an immediate appeal of class claims if they were severed from the individual claims. Such a rule does not guarantee, or even likely result in, multiple appeals as suggested by Respondent, so it is a stretch to say that the Court came to such a conclusion. In practice, when class claims are appealed under *Daar*, it is virtually automatic that the individual claims will be stayed to avoid inefficient and potentially duplicate litigation in the event the appeal is successful and returns the class claims to the trial court. Accordingly, the multiple appellate deadlines suggested by Respondent's statement are, in practice, unusual. Under the Court of

That a party may "easily consolidate[]" the inevitable multiple appeals, as argued by Respondent, is no consolation and provides no support to eviscerate the final judgment rule. Given that most courts are likely to issue a single order as to all claims on a demurrer (versus separate orders for class and individual claims), there is no reason to mandate multiple appeals in every such instance. It stands to reason that the general rule, and any exception, should serve to simplify the dominant "single order" judicial procedure and reserve any piecemeal consolidation of appeals for the rare "two-order" scenario, not vice versa.

III. THE COURT OF APPEAL'S RULING IS ERRONEOUS ON THE MERITS

Finally, Respondent's arguments, and the Court of Appeal's order, ignore that the death knell exception to the one final judgment rule is dependent on a demurrer sustained as to a plaintiff's class claims while the plaintiff's individual claims are allowed to proceed. As discussed below, that context is critical to the holding in *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699, but absent in the present case. By ignoring that context, the Court of Appeal expanded the death knell exception in a manner that threatens to supplant the one final judgment rule itself. As discussed above, allowing that expansion to stand means, at a minimum, for every class action subject to the entry of demurrer on all claims, a confusing, concurrent and inefficient dual appellate timeline will exist.

The impetus of the death knell doctrine was that, under the one final judgment rule, if class claims were severed from the individual claims on demurrer, the putative class would have no right to appeal the decision until

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Appeal's rule, however, every time a plaintiff appeals a demurrer order sustained as to class claims, it will be followed by an appeal of the plaintiff's claim, guaranteeing a multiplicity of appeals.

a judgment, *if any*, was entered on the individual claims. *See Daar,* 67 Cal.2d at 699; *and Farwell v. Sunset Mesa Property Owners Ass'n, Inc.* (2008) 163 Cal.App.4th 1545, 1552 ("the gist of the death knell doctrine is that the denial of class action certification is the *death knell of the action itself*, i.e., that without a class, there will not be an action or actions, as is true of cases when the individual plaintiff's recovery is too small to justify pursuing the action") (emphasis in original). Because the class and individual claims were no longer proceeding in tandem, and because the rights of the class and the individual plaintiff were no longer intertwined, California courts evaluate the "legal effect" of the demurrer order to determine whether the termination of the class claims met the criteria established for immediately appealable orders. *See Daar,* 67 Cal.2d at 699; *and Farwell,* 163 Cal.App.4th at 1547 ("the death knell doctrine fits comfortably into the exception to the 'one final judgment' rule that arises when parties have separate and distinct interests; when this is true, there can be a final and appealable judgment for each such party.") Essentially, it would be unfair to deny the putative class a right to immediate review where the individual plaintiff no longer retained a duty to the class and the individual plaintiff's incentive to pursue the matter to judgment was diminished. In addition, under such circumstances, the courts recognize that if an individual plaintiff does pursue his or her individual claims to judgment, the delay would likely result in prejudice to the class and the defendant who, in the event of a successful appeal of the denial of class certification, would be forced to relitigate many core issues and revisit discovery in light of the class status being reinstated.

Such issues regarding fairness or prejudice do not arise when a demurrer is sustained as to both individual and class claims in the same

order, as was done in the present case. (AA at 353-55). The relationship between the individual and class claims has not been severed. The scale of the case, and thus the plaintiff's case strategy, has not been impacted. There will be no long or prejudicial delay, because the appeal of all issues will promptly follow the forthcoming judgment. Accordingly, there is no need to engage an exception to the one final judgment rule to determine whether the order has the "legal effect" of a final judgment in relation to the class while ignoring that same analysis for the individual plaintiff's portion of the order—the entire order will be the subject of a prompt, single judgment giving rise to an appeal.[2] The Court of Appeal's reformulation of the rule and its exception in an effort to create a bright-line ignores that the one final judgment rule already provides a bright-line under these facts. In addition, the Court of Appeal's rule is more complex in that a single order gives rise to two divergent appellate timelines, creating the potential for the serious jurisdictional consequences discussed above as well as extraneous work and paper to consolidate multiple appeals where only one should be necessary. Such a rule not only undermines the precision of the one final judgment rule and its companion death knell exception as created by *Daar*,

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[2] For this reason, Respondent's reliance on *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 is misplaced. First, *Morehart* was not a class case, nor did the Court undertake an analysis in relation to class cases. Second, and more important, *Morehart's* discussion of when to attribute section 904.1(a) finality to interlocutory judgments or orders is in the context of whether an exception to the one final judgment rule is required to ensure fairness in the appellate timeline. *Id.* at 704-41, 744. Essentially, the context was whether an interlocutory judgment or order can satisfy the hallmarks of finality to trigger an appeal *even though some claims remain at issue in the case*; however, there is no need to reach that analysis or engage an exception to the general rule when all claims are disposed of and a single, final judgment is guaranteed.

but replaces an elegant and efficient solution with a guaranteed multiplicity of proceedings.

Respondent also claims that Plaintiff is arguing for appellate timelines that turn on the form or manner of an order instead of its "legal effect." What this argument misses is that the one final judgment rule does not require an evaluation of the legal effect of a demurrer order, and that the courts turn to such an analysis under the death knell exception to permit, for purposes of fairness, what would otherwise be deemed a premature appeal, not to preclude appeals which would be timely under the general rule. *See e.g., Daar,* 67 Cal.2d at 699. If the exception is unnecessary here, so is the "legal effect" analysis. Indeed, if the "legal effect" of an order overrides the one final judgment rule and serves as the ultimate criteria to establish the appellate deadline, then the logical extension is that the portion of the trial court's order sustaining the demurrer as to all *individual* claims was also immediately appealable because it had the legal effect of terminating all of Petitioner's claims. This result, however, is contradicted by the Court of Appeal's decision finding jurisdiction over Petitioner's individual claims, as well as long-standing case law that demurrer orders are not immediately appealable. *See e.g., Lavine v. Jessup* (1957) 48 Cal. 2d 611, 614 ("An order sustaining a demurrer without leave to amend is nonappealable, and the appeal must be taken from the ensuing judgment . . . [T]he time for appeal d[oes] not commence to run until the entry of judgment.") (citations omitted). Allowing the Court of Appeal's rule to stand undermines such long standing case law and constitutes a substantial step toward making the one final judgment rule the exception to the death knell doctrine.

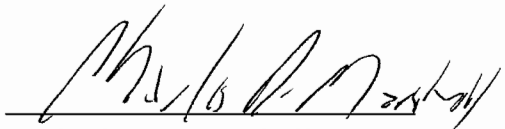
CONCLUSION

The Court of Appeal's reformulation of the one final judgment rule and death knell doctrine undermines the policy considerations embodied by those doctrines and threatens inefficient and confusing procedure in a multitude of litigations. This rule trades the bright-line of the one final judgment rule for a complicated, dual appellate deadline for all class cases in which a demurrer is entered as to all claims. For these reasons, those stated above, and those stated in the Petition for Review, this Court should grant review.

DATED: January 15, 2010

Respectfully submitted,

GREEN WELLING, P.C.

By: 

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CERTIFICATION OF WORD COUNT

Pursuant to Rules 8.204(c)(1) and 8.504(d)(1) of the California Rules of Court, I certify that the attached Petition for Review was produced on a computer. According to the computer program's word count function, the Petition for Review has 2,653 words.

DATED: January 15, 2010

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CERTIFICATE OF SERVICE

I, Leslie R. Cuesta, hereby declare as follows:

I am employed by Green Welling, A Professional Corporation, 595 Market Street, Suite 2750, San Francisco, California 94105. I am over the age of eighteen years and am not a party to this action. On January 15, 2010, I served the within document(s):

PETITION FOR REVIEW

_____ by placing the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

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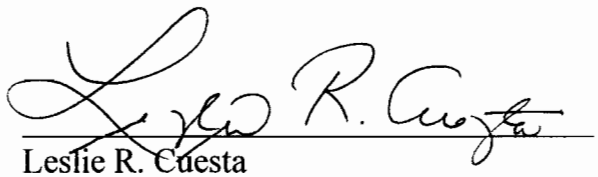
I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed January 15, 2010, at San Francisco, California.



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