No. S222996

IN THE SUPREME COURT CALIFORNIA

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

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

Class Plaintiff and Respondent,

vs.

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

Defendants and Respondents.

ANSWER BRIEF ON THE MERITS
(CLASS PLAINTIFF AND RESPONDENT MARK LAFFITTE)

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

LAW OFFICES OF KEVIN T. BARNES
Kevin T. Barnes, Esq. (SBN 138477)
Gregg Lander, Esq. (SBN 194018)
5670 Wilshire Boulevard, Suite 1460
Los Angeles, CA 90036-5664
Telephone: (323) 549-9100
Facsimile: (323) 549-0101

Attorneys for Class Plaintiff and Respondent
MARK LAFFITTE
(Additional Class Plaintiff's counsel listed on Proof of Service)

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Los Angeles, CA 90036-5664
Telephone: (323) 549-9100
Facsimile: (323) 549-0101

Attorneys for Class Plaintiff and Respondent
MARK LAFFITTE
(Additional Class Plaintiff's counsel listed on Proof of Service)

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INTRODUCTION

For more than 10 years, experienced class counsel vigorously and extensively litigated this complex wage and hour class action against a formidable, skilled and well-financed adversary. In pursuing claims on behalf of the Class Plaintiffs, class counsel advanced more than $100,000 in costs, worked without compensation and lost the opportunity to work on other potentially profitable matters – all with *no guarantee* that class counsel would ever receive any compensation for their efforts. Ultimately, Class Plaintiffs and their employer agreed to a ***$19 million settlement*** which, by any standard of measurement, was an outstanding result for nearly 4,000 Class Plaintiffs (resulting in an average class member award of nearly $4,400).

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

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

This Court granted review, identifying a single issue: "Does [*Serrano III*] permit a trial court to anchor its calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered?" As shown by this Court's own precedents, both pre- and post-*Serrano III*, as well as the overwhelming majority of federal and state appellate opinions to address this question since *Serrano III*, the answer is simple and resounding: **Yes**.

First, *Serrano III* ***did not ban the percentage method in common fund cases***. *Serrano III* was neither a common fund case nor held that courts must utilize the lodestar method in common fund cases. In fact, Objector and Appellant David Brennan's argument is fundamentally flawed, as he selectively extracts dicta from a footnote in *Serrano III* and improperly treats it as creating an unequivocal ban on the use of the percentage method in common fund cases. That dicta, however, did ***not*** apply to common fund cases. Moreover, the dicta is based on two decisions that are no longer reliable – a Second Circuit decision which has since been *abrogated* and a Third Circuit decision which has been eviscerated by numerous, more recent Third Circuit decisions which have repeatedly confirmed that courts may utilize the percentage method to award attorneys' fees in common fund cases. Indeed, in the nearly 40 years since this Court issued *Serrano III*, both State and Federal courts analyzing this issue have almost universally confirmed – based upon decades of experience dealing with fee awards in class action cases – that the percentage method is an appropriate tool to calculate reasonable attorneys' fees. Not surprisingly, California appellate courts have followed suit and – since *Serrano III* – routinely apply the percentage method to award

attorneys' fees in common fund. In short, the time has come for this Court to fully endorse the percentage method in common fund cases.[1]

Second, as a matter of policy, utilizing the percentage method in common fund cases makes eminently good sense. The percentage method is easy to administer, conserves judicial resources, rewards counsel for the results obtained, rewards efficiency, aligns the interests of the class and counsel (both benefit from a large award that is obtained efficiently), provides reasonable compensation at market value and provides predictability to the class and counsel before litigation commences, which allows a proper weighing of the risks/reward inherent in the litigation before filing. However, applying the lodestar method removes that predictability, making it far more difficult for counsel to accurately assess the risk/reward in a given case. For example, counsel will not know the hourly rate the Court will award, counsel may not be fully compensated for the years of delay in payments for services rendered and counsel will not know if a multiplier will be applied (much less the amount of any multiplier). The lack of predictability created by the lodestar method will have at least one clear consequence: Class counsel will be less inclined to take on complex class action suits against large, well-financed institutions. Thus, application of the lodestar method will effectively close the courthouse door to millions of poor and low-wage workers who will no longer be able to retain counsel to vindicate valid wage and hour (and other) class action claims. If the concept of "equal justice under the law" is

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[1] David Brennan cites several authorities for the proposition that the lodestar method ***must*** be utilized in common fund cases. Those authorities, however, fail to support Mr. Brennan's position, as those were not common fund cases. In fact, no California appellate court has ever directly held that awarding fees based on the percentage method is inappropriate in common fund cases.

valid, it must mean that all persons, whether rich or poor, may hire a lawyer to represent them.

Third, as a matter of policy, the lodestar method is simply unworkable in the common fund context. Indeed, courts and commentators are virtually unanimous in condemning the lodestar method in common fund cases and have identified numerous significant problems in implementing the lodestar method in common fund cases. For example, the lodestar method: (1) imposes a massive time burden on scarce judicial resources; (2) encourages excessive billing and padded hours; (3) discourages early settlement; (4) results in substantial delay (as is the case here); (5) lacks objectivity; (6) is subject to manipulation; (7) lacks predictability; (8) abandons the adversary process (requiring the court to set aside its impartiality and champion the interests of some litigants); (9) requires judges to make an after-the-fact assessment of class counsel's strategic decisions during litigation; (10) increases the amount of fee litigation; and (11) puts counsel and the class in an adverse relationship. These problems are eliminated by applying the percentage method in common fund cases.

Fourth, every federal circuit has concluded that the percentage method may be utilized to determine reasonable attorneys' fees in a common fund case. In fact, two circuits (the Eleventh and the District of Columbia) have held that trial courts ***must*** utilize the percentage method in common fund cases.

Fifth, nearly every state that has considered the issue has concluded that the percentage method is an appropriate means for determining reasonable attorney fees in a common fund case. In fact, only two states have expressly rejected the use of the percentage method to determine attorneys' fees in a common fund case.

Finally, given the numerous well-documented deficiencies with the lodestar method, this Court should follow the nearly universal trend of permitting trial courts to exercise their discretion to apply the percentage method or the lodestar method or some combination of the two (as was the case here) to reach a reasonable fee award.

For these reasons, and those set forth below, this Court should affirm the appellate court's ruling.

STATEMENT OF THE CASE

1. The Complaint

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

2. The Settlement Agreement

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

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

Although the Court-approved Class Notice was sent to 3,996 class members, there were ***only two objections***. *Id.* at 140. On January 28, 2013, class member David Brennan objected, arguing, in part, that the fee request was excessive. *Id.*

3. Class Counsel's Request For Attorneys' Fees

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

4. The Trial Court's Tentative Ruling

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

At this hearing, the trial court stated:

> What I didn't say in my tentative and should have said that in looking at the loadstar, I do find that the tasks that were performed by class counsel and the number of hours that they spent on those tasks were reasonable and that fees were within the range. The hourly fees, if you're looking at loadstar, are within the range

> of what is reasonable for this type of work in this community.

(RT 32).

5. The Trial Court's Ruling

On April 10, 2013, the trial court held another hearing and overruled Mr. Brennan's objections. *Id.* at 142. The trial court also conducted a cross-check on the fees awarded pursuant to the percentage method and analyzed the lodestar amount. *Id.* at 143. The trial court concluded that the hours worked and hourly rates charged were within the norm. The trial court also found sufficient information to support the multiplier. The trial court then granted final approval of the class action settlement and awarded $6,333,333.33 in attorneys' fees and $127,304.08 in costs. *Id.*

6. The Appellate Court's Ruling

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

The *Laffitte* Court acknowledged that in *Serrano III*, the California Supreme Court established the "primacy of the lodestar method in California." *Laffitte*, 180 Cal.Rptr.3d at 147 (*quoting Lealao*, 82 Cal.App.4th at 26). Nevertheless, the Court held that "[s]ubsequent judicial opinions have made it clear that a ***percentage fee award in a common fund case 'may still be done.'***" *Id.* at 148 (emphasis added) (*citing In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 96 Cal.Rptr.3d 127; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 75 Cal.Rptr.3d 413; *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 25 Cal.Rptr.3d 514; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 110 Cal.Rptr.2d 145). Based on these

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

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

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

> The trial court did not use the percentage of fund method exclusively to determine whether the amount of attorneys' fees requested was reasonable and appropriate. The trial court also performed a lodestar calculation to cross-check the reasonableness of the percentage of fund award. This was entirely proper.

Id. at 149-50. The *Laffitte* Court specifically held that the trial court "did not abuse its discretion in performing a lodestar calculation based on the declarations of class counsel to cross-check the percentage of fund award." *Id.* at 151. The *Laffitte* Court also held that the trial court's "use of a multiplier of 2.13 was not an abuse of discretion," as the trial court properly considered "the proper lodestar multiplier factors in determining whether to apply a multiplier, including the difficulty of the issues in this case, the skill of class counsel, the contingent nature of the case, and the preclusion of other employment." *Id.*

7. This Court Grants Review

On February 25, 2015, this Court granted Mr. Brennan's Petition for Review. In doing so, this Court certified the following question for review: "Does *Serrano v. Priest* (1977) 20 Cal.3d 25 permit a trial court to anchor its calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered?"

LEGAL DISCUSSION

1. An Historical Perspective On Percentage Fee Awards In Common Fund Cases

To fully understand why *Serrano III* permits California trial courts to utilize the percentage method as the anchor to calculate reasonable attorney's fees in common fund cases, it is necessary to understand the history of percentage fee awards.

"The common fund . . . doctrine . . . is a venerable exception to the general American rule disfavoring attorney fees in the absence of statutory or contractual authorization." *Lealao*, 82 Cal.App.4th at 27 (*citing Trustees v. Greenough*, 105 U.S. 527 (1881)). "Traditionally, counsel fees in common fund cases were computed as a percentage of the fund, subject, of course, to considerations of reasonableness." *Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Lit.* ("*Dupont Plaza*"), 56 F.3d 295, 305 (1st Cir. 1995) (*citing Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 127-28 (1885)).

Prior to 1977 – when the California Supreme Court decided *Serrano III* – it was undisputed that "California courts could award a percentage fee in a common fund case." *Lealao*, 82 Cal.App.4th at 27. In the mid-1970s, however, the "judicial infatuation with the lodestar method started to spread." *Dupont Plaza*, 56 F.3d at 305; *see also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1266 (D.C. Cir. 1993) ("The application of a percentage-of-the-fund approach sometimes resulted in large fee awards, and in the 1970s several courts began a movement to alternative methods of calculating attorneys' fees.").

"In 1973, the Third Circuit led the way in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), instructing judges in that circuit to first compute the product of the reasonable hours expended and the reasonable hourly rate to

arrive at the 'lodestar.'" *Swedish Hosp.*, 1 F.3d at 1266. This new application of the lodestar method "shifted the emphasis from a fair percentage of recovery to the value of the time expended by counsel." *Id.*; *see also Lealao*, 82 Cal.App.4th at 27 (noting that *Lindy* "pioneered adoption of the lodestar methodology" and that the *Lindy* lodestar method "quickly gained wide acceptance among the federal circuits"). "Many courts embraced the new approach, and a wall of cases soon arose." *Dupont Plaza*, 56 F.3d at 305.[2]

In 1984, however, a "crack in the wall appeared" when the United States Supreme Court distinguished between the calculation of counsel's fees under fee-shifting statutes from the calculation of counsel's fees under the common fund doctrine. *Id.* (*citing Blum v. Stenson*, 465 U.S. 886 (1984)). In *Blum*, the United States Supreme Court stated (in dicta) that in common fund cases, "a reasonable fee is based on a ***percentage of the fund*** bestowed on the class." *Blum*, 465 U.S. at 900 n.16 (emphasis added).[3]

One year after the *Blum* decision, "the Third Circuit, which had been in the forefront of the movement toward the lodestar method, sounded a note of caution." *Dupont Plaza*, 56 F.3d at 306. The Third Circuit formed a task force headed by Professor Arthur Miller and comprised of judges and attorneys, to study court-awarded attorneys' fees. *See Report of the Third Circuit Task Force, Court Awarded Attorney Fees* ("Third Circuit Report"), 108 F.R.D. 237 (1985). This "blue-ribbon task force . . . concluded that ***all***

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[2] In this context, this Court issued its decision in *Serrano III* in 1977.

[3] Although the language in *Blum* was dicta (as *Blum* involved no common fund), it is entirely consistent with a prior United States Supreme Court decision approving a fee award based on the percentage method in a common fund case. *Swedish Hosp.*, 1 F.3d at 1268 (*citing Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Thus, the United States Supreme Court "has indicated, obliquely, that the percentage method is at least appropriate." *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 643 n.28 (5th Cir. 2012).

fee awards in common fund cases should be structured as a percentage of the fund." *Dupont Plaza*, 56 F.3d at 306 (emphasis added) (*citing* Third Circuit Report at 255).

Professor Miller's task force found the lodestar method to be a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar." *Lealao*, 82 Cal.App.4th at 29 (*citing* Third Circuit Report at 258). The task force identified nine deficiencies in the lodestar method, concluding that it: (1) "increases the workload of an already overtaxed judicial system"; (2) is "insufficiently objective and produce[s] results that are far from homogeneous"; (3) "creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law"; (4) "is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount"; (5) is subject to abuses as it "encourages lawyers to expend excessive hours, and ... engage in duplicative and unjustified work"; (6) "creates a disincentive for the early settlement of cases"; (7) deprives trial courts of "flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered"; (8) "works to the particular disadvantage of the public interest bar" because the "lodestar" is set lower in civil rights cases than in securities and antitrust cases; and (9) results in "considerable confusion and lack of predictability." *Id.* at 29 (*quoting* Third Circuit Report at 246-49).

The Third Circuit Report has been "influential" and the "criticisms of the lodestar approach set forth in this Report are now echoed by many authorities, who have been most vocal about the manner in which it exacerbates the problem of 'cheap settlements' and burdens already overworked trial judges." *Id.* at 29-30. "Together, footnote 16 [in *Blum*] and the Third Circuit Report led to a thoroughgoing reexamination of the

suitability of using the lodestar method in common fund cases. This reexamination, in turn, led to more frequent application of the [percentage] method in such cases." *Dupont Plaza*, 56 F.3d at 306.

Today, virtually every state and federal jurisdiction to pass on this issue has held that the percentage method is an appropriate method to calculate reasonable attorneys' fees in common fund cases.

2. All Federal Circuits Approve The Percentage Method In Common Fund Cases

A. Two Federal Circuits *Require* Courts To Utilize The Percentage Method In Common Fund Cases

In the Eleventh Circuit, courts ***must*** apply the percentage method in common fund cases. *See, e.g., Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, attorneys' fees awarded from a common fund ***shall*** be based upon a reasonable percentage of the fund established for the benefit of the class.") (emphasis added); *see also Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011) (same).

Similarly, in the District of Columbia Circuit, courts ***must*** apply the percentage method in common fund cases. *See, e.g. Swedish Hosp.*, 1 F.3d at 1272 ("[W]e conclude that percentage-of-the-fund is the proper method for calculating fees in a common fund case.").

B. The Remaining Federal Circuits *Permit* Courts To Utilize The Percentage Method In Common Fund Cases

Ninth Circuit: *In re Bluetooth Headset Products Liability Lit.*, 654 F.3d 935, 942 (9th Cir. 2011) ("Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method."); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994) (In the Ninth Circuit, "the district court has discretion to use

either [the percentage method or the lodestar] method in common fund cases.").

First Circuit: *U.S. v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st Cir. 1999) ("The trial court enjoys 'extremely broad' latitude in determining the appropriate shares of the common fund, and may calculate such an award either on the basis of a reasonable percentage of the fund, or using a lodestar method . . . ."); *Dupont Plaza*, 56 F.3d at 307 ("[W]e hold that in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar.").

Second Circuit: *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) ("The District Court properly utilized the 'percentage of the fund' method in calculating counsel fees, applying the lodestar method 'as a 'cross check' on the reasonableness of the requested percentage.'"); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) ("[W]e hold that both the lodestar and the percentage of the fund methods are available to district judges in calculating attorneys' fees in common fund cases.").

Third Circuit: *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 734 (3d Cir. 2001) ("The percentage-of-recovery method has long been used in this Circuit in common-fund cases."); *In re Prudential Ins. Co. America Sales Practice Lit. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) ("The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'") (quotation omitted).

Fourth Circuit: "[T]he Fourth Circuit has not determined the preferred method for calculating attorneys' fees where the common fund has been generated on behalf of a class." *Archbold v. Wells Fargo Bank,*

N.A., 2015 WL 4276295, *4 (S.D. W.Va. July 14, 2015). Nevertheless, "[d]istrict courts within the Fourth Circuit have consistently endorsed the percentage method." *Id.* (citing cases).

Fifth Circuit: The Fifth Circuit has been "amenable" to the use of the percentage method in common fund cases. *Union Asset*, 669 F.3d at 643.[4]

Sixth Circuit: *Rawlings v. Prudential–Bache Props., Inc.*, 9 F.3d 513, 517 (6th Cir. 1993) ("[W]e conclude that use of either the lodestar or percentage of the fund method of calculating attorney's fees is appropriate in common fund cases . . . .").

Seventh Circuit: *Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014) ("[T]he choice of methods is discretionary. . . . [I]n our circuit, it is legally correct for a district court to choose either."); *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) ("[I]n common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court.").

Eighth Circuit: *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement . . . ."); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) ("It is within the discretion of the district court to choose which method to apply.").

Tenth Circuit: *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994) ("In our circuit, . . . either [the percentage method or the lodestar] method is

[4] Fifth Circuit courts applying the percentage method must also apply twelve "*Johnson* factors" to ensure "a reasonable fee." *Union Asset*, 669 F.3d at 642 n.25 (*citing Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *overruled on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989).

permissible in common fund cases."); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) ("We hold, therefore, that the award of attorneys' fees on a percentage basis in a common fund case is not *per se* an abuse of discretion.").[5]

3. Virtually Every State Has Endorsed The Percentage Method

"In recent years, state courts have ***overwhelmingly*** awarded fees pursuant to the percentage method, rather than the lodestar method." Conte & Newberg, 4 Newberg on Class Actions ("Newberg"), § 13:80 at 496 (emphasis added). "The vast majority of [state] jurisdictions do not use the lodestar method when a common fund is created." *Id.*, § 13:80 at 495. "In common fund cases, . . . federal and state courts alike have increasingly returned to the percent-of-fund approach, either endorsing it as the only approach to use, or agreeing that a court should have flexibility to choose between it and a lodestar approach, depending on which method will result in the fairest determination in the circumstances of a particular case." *Strawn v. Farmers Ins. Co. of Oregon*, 353 Or. 210, 219, 297 P.3d 439 (2013).

The following states have endorsed the percentage method as a proper means for determining the reasonable attorneys' fees in common fund cases:

Alabama: *Edelman & Combs v. Law*, 663 So.2d 957, 959 (1995) ("We hold that in a class action where the plaintiff class prevails and the lawyer's efforts result in a recovery of a fund, by way of settlement or trial,

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[5] Mr. Brennan grudgingly concedes, as he must, that federal courts have permitted use of the percentage method. (Appellant's Opening Brief ("AOB") at 31 n.14) ("Federal law regarding the primacy of the lodestar analysis has changed since . . . the late 1970s. In the federal system, most, if not all circuits, permit courts to choose either the lodestar or percentage approaches.").

a reasonable attorney fee should be determined as a percentage of the amount agreed upon in settlement or recovered at trial.").

Alaska: *Edwards v. Alaska Pulp Corp.*, 920 P.2d 751, 758 (1996) ("[A] trial court applying the common fund doctrine has the discretion to determine whether to apply the percentage of the fund method or the modified lodestar method in order to calculate attorney's fees.").

Arizona: *Arizona Dept. of Admin. v. Cox*, 222 Ariz. 270, 279, 213 P.3d 707 (App. 2009) (approving use of the percentage method in a common fund case to calculate attorneys' fees).

Colorado: *Brody v. Hellman*, 167 P.3d 192, 201 (Colo. 2007) (approving use of the percentage method in a common fund case).

Connecticut: *Towns of New Hartford and Barkhamsted v. Connecticut Resources Recovery Authority*, 2007 WL 4634074, *11-12 (Conn. Dec. 7, 2007) (awarding fees in a common fund case pursuant to the percentage method).

Delaware: *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1262 (Del. 2012) (approving fee award pursuant to the percentage method).

Georgia: *Friedrich v. Fidelity Nat. Bank*, 247 Ga.App. 704, 707, 545 S.E.2d 107 (2001) ("when assessing attorney fees in a common fund case, a percentage of the fund analysis is the preferred method of determining these fees").

Hawaii: *Chun v. Board of Trustees of Employees' Retirement System of State of Hawaii*, 92 Hawai'i 432, 445, 992 P.2d 127 (2000) ("[I]n common fund cases, the decision whether to employ the percentage method or the lodestar method be reposed within the discretion of the trial court.").

Illinois: *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235, 243-44, 659 N.E.2d 909 (1995) ("[W]e hold that the circuit court is vested with the discretionary authority to choose the percentage-of-the-award

method or the lodestar method to determine the amount of fees to be granted plaintiffs' counsel in common fund class action litigation.").

Indiana: *Citizens Action Coalition of Indiana, Inc. v. PSI Energy, Inc.*, 664 N.E.2d 401, 407 (Ind. 1996) (trial court has discretion to apply the percentage method).

Iowa: *Hagge v. Iowa Dept. of Revenue and Finance*, 539 N.W.2d 148, 152 (Iowa 1995) (approving use of the percentage method, but finding no common fund existed in this particular case).

Kansas: *Gigot v. Cities Service Oil Co.*, 241 Kan. 304, 319, 737 P.2d 18 (1987) (approving fee award as percentage of common fund).

Kentucky: *College Retirement Equities Fund, Corp. v. Rink*, 2015 WL 226112, *7 (Ky. App. Jan. 16, 2015) (approving use of the percentage method in common fund case).

Louisiana: *Avants v. Kennedy*, 837 So.2d 647, 658 (La.App. 1 Cir. 2002) (approving use of the percentage method in a common fund case).

Maryland: *United Cable Television of Baltimore Ltd. Partnership v. Burch*, 354 Md. 658, 687, 732 A.2d 887 (1999) (trial court has discretion to apply the percentage method in common fund cases).[6]

Minnesota: *Heller v Schwan's Sales Enterprises, Inc.*, 548 NW2d 287 (Minn.CtApp. 1996) ("[A]llocating attorneys' fees as a proportion of the recovery for each class member is acceptable as an application of the common-fund doctrine.").

Nevada: *Hsu v. County of Clark*, 123 Nev. 625, 636, 173 P.3d 724 (2007) ("attorney fees awarded pursuant to Nevada law may be based on either a 'lodestar' amount or a contingency fee").

New Jersey: *Sutter v. Horizon Blue Cross Blue Shield of N.J.*, 406 N.J.Super. 86, 103-04, 966 A.2d 508 (N.J.App.Div.2009) ("A court may

[6] Superseded by statute on other grounds. *See Plein v. Dep't of Labor, Licensing and Regulation*, 369 Md. 421, 800 A.2d 757 (2002).

consider two different methods for determining class action fees: the lodestar method and the percentage of recovery method.").

New York: *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 56 A.D.3d 162, 165, 865 N.Y.S.2d 706 (N.Y.App. Div.3d Dep't 2008) (recognizing the percentage method as an acceptable option for calculating attorneys' fees in class action litigation).

New Mexico: *In re N.M. Indirect Purchasers Microsoft Corp.*, 140 N.M. 879, 896, 149 P.3d 976 (2006) ("[W]e join the majority of jurisdictions and hold that the choice of method is within the district court's discretion.").

North Carolina: *Long v. Abbott Laboratories*, 1999 WL 33545517, *5 (N.C.Super. July 30, 1999) ("In common fund cases, the North Carolina trial courts have routinely adopted a multiple factor or hybrid approach to determining attorney fees which uses both the percentage of the fund method and the lodestar method . . . .").

Ohio: *Steiner v. Van Dorn Co.*, 104 Ohio App.3d 51, 53 n.2, 660 N.E.2d 1256 (1995) ("Two different methods of determining attorney fees are traditionally used when courts award fees in common fund cases, the lodestar method and the reasonable percentage method.").

Oregon: *Strawn*, 353 Or. at 220-21 (approving the percentage method in common fund cases).

Pennsylvania: *Braun v. Wal–Mart Stores, Inc.*, 24 A.3d 875, 979 (Pa.Super.2011) ("[C]ourts are permitted to award a reasonable fee pursuant to a lodestar, a percentage of the common fund, or, if necessary, a hybrid approach.").

South Carolina: *Layman v. State*, 376 S.C. 434, 454, 658 S.E.2d 320 (2008) ("percentage-of-the-recovery approach may be appropriate under circumstances in which a court is given jurisdiction over a common

fund from which it must allocate attorneys' fees among a benefited group of litigants").

Texas: *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960 (Tex. 1996) (approving use of the percentage method).

Washington: *Bowles v. Washington Dept. of Retirement Systems*, 121 Wash.2d 52, 72, 847 P.2d 440 (1993) (en banc) ("[T]he percentage of recovery approach is used in calculating fees under the common fund doctrine.").

Wisconsin: *Wisconsin Retired Teachers Ass'n, Inc. v. Employe Trust Funds Bd.*, 207 Wis.2d 1, 38, 558 N.W.2d 83 (1997) (approving use of the percentage method in a common fund case).

In fact, it appears that only Florida and Massachusetts have specifically rejected application of the percentage method in common fund cases. *See, e.g.*, *Kuhnlein v. Dep't of Revenue*, 662 So.2d 309, 311-12 (Fla. 1995); *American Trucking Associations, Inc. v. Secretary of Admin.*, 415 Mass. 337, 353, 613 N.E.2d 95 (1993).

4. *Serrano III* Did Not Ban The Percentage Method In Common Fund Cases

A. *Serrano III* Was Not A Common Fund Case

In *Serrano III*, the plaintiffs obtained a judgment holding that: (1) California's public school financing system violated state equal protection laws; and (2) the system must be brought into constitutional compliance within six years. *Serrano III*, 20 Cal.3d at 31. The plaintiffs' counsel then sought attorneys' fees from various state officials (in their official capacity) based on three equitable theories: (1) the common fund theory; (2) the substantial benefit theory; and (3) the private attorney general theory. *Id.* at 31-32. The trial court awarded fees pursuant to the private attorney general theory. *Id.* at 32. On appeal, defendants argued, *inter alia*, that the award of attorneys' fees was improper under any of these three theories. *Id.* at 33.

The plaintiffs argued, in turn, that the trial court erred in refusing to also base its award on the common fund and substantial benefit theories. *Id.*

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

Serrano III further noted that the California Supreme Court first approved of the common fund theory in 1895 and that the common fund theory "has since been applied by the courts of this state in numerous cases." *Id.* The Court specifically noted that the common fund theory applies when "the activities of the party awarded fees have resulted in the preservation or recovery of a certain or ***easily calculable sum of*** money out of which sum or 'fund' the fees are to be paid." *Id.* (emphasis added). In

sum, the *Serrano III* Court acknowledged the well-settled principle of awarding fees out of a common fund but ultimately concluded that the common fund approach was inappropriate ***in that case*** because ***that*** litigation did not create a common fund. *Id.* at 35-38.

Thus, *Serrano III* did not preclude courts from utilizing the percentage method in common fund cases.

B. *Serrano III* Did Not Require Courts To Use The Lodestar Method In Common Fund Cases

Mr. Brennan argues that *Serrano III* requires California courts to utilize the lodestar method in common fund cases because *Serrano III* states (in a footnote) that the "starting point of every fee award . . . must be a calculation of the attorney's services in terms of the time he has expended on the case." *Serrano III*, 20 Cal.3d at 48 n.23. This argument is misguided.

First, as noted above, in *Serrano III* this Court readily acknowledged that the common fund theory: (1) has been continuously applied by California courts since 1895; and (2) applies when "the activities of the party awarded fees have resulted in the preservation or recovery of a certain or easily calculable sum of money out of which sum or 'fund' the fees are to be paid." *Id.* at 35. The Court merely concluded that the common fund was inappropriate in *that* case because the litigation did not create a common fund. Because *Serrano III* was not a common fund case, it neither mandated use of the lodestar method nor barred use of the percentage method in common fund cases.

Second, this Court extensively discussed the common fund doctrine in ***Section II(a)*** of the *Serrano III* opinion. *Id.* at 34-38. The excerpt on which Mr. Brennan relies, however, appears in a footnote in ***Section V*** of the opinion. In fact, in Section II(a), the *Serrano III* Court merely concluded that the common fund approach was inappropriate because, in

that particular case, the litigation did not create a common fund. *Id.* at 37-38.

In Section III of the *Serrano III* opinion, the Court approved the trial court's award of attorneys' fees under the private attorney general theory. *Id.* at 47 ("[T]he trial court acted within the proper limits of its inherent equitable powers when it concluded that reasonable attorneys fees should be awarded to plaintiffs' attorneys on the 'private attorney general' theory.") (footnote omitted). Then, in ***Section V*** of the opinion, the Court addressed class counsel's argument that the fee awarded under the private attorney general theory was "inadequate" under the circumstances. *Id.* at 48-49. There, the *Serrano III* Court held that the trial court did not abuse its discretion in awarding fees, concluding that the "experienced trial judge is the best judge of the value of professional services rendered in his court." *Id.* at 49 (quotation omitted). Thus, the Court made its statement concerning the "starting point" for fee awards in the context of analyzing the amount of the award ***pursuant to the private attorney general theory***. This statement was ***not*** made in connection with the common fund theory.

Finally, Mr. Brennan argues that California courts may never use the percentage method because *Serrano III* states (in a footnote) that the "starting point of every fee award . . . must be a calculation of the attorney's services in terms of the time he has expended on the case." (AOB at 7) (*quoting Serrano III*, 20 Cal.3d at 48 n.23). The support for the "starting point" language is based on two authorities: *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) and *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). These authorities, however, have been undermined by the same courts that issued them.

For example, in *City of Detroit*, the Second Circuit reversed and remanded a 15% fee award with instructions to base all future awards

pursuant to the lodestar method. *City of Detroit*, 495 F.2d at 470-71. In 2000, however, the Second Circuit ***abrogated*** *City of Detroit* and expressly approved the percentage method, stating that "both the lodestar and the percentage of the fund methods are available to district judges in calculating attorneys' fees in common fund cases." *Goldberger*, 209 F.3d at 50.

Similarly, in *Lindy Bros.*, the Third Circuit initially set forth the lodestar method as the means to determine reasonable attorneys' fees. Since 1985, however, the Third Circuit has repeatedly "reaffirmed that application of a percentage-of-recovery method is appropriate in common-fund cases." *Cendant*, 243 F.3d at 734. Thus, to the extent *City of Detroit* and *Lindy Bros.* previously adopted the lodestar method in common fund cases, those holdings are no longer valid. As such, these authorities no longer support *Serrano III*'s statement that the lodestar method is the only "starting point" for determining fee awards in common fund cases.

For all these reasons, it is evident that *Serrano III* did not and does not bar California courts from applying the percentage method in common fund cases.[7]

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[7] Mr. Brennan also argues that this Court's decision in *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 104 Cal.Rptr.2d 377, supports the conclusion that the lodestar method is the "first step" in calculating attorneys' fees. (AOB at 12). Mr. Brennan's reliance on *Ketchum* is misplaced, as it was *not a common fund case*. Rather, *Ketchum* addressed a *statutory* fee award. As such, *Ketchum* sheds no light on the propriety of the percentage method in common fund cases. Notably, however, *Ketchum* did state that the lodestar method was ***not the sole method*** for determining statutory fee awards, explaining: "We emphasize, . . . that although we are persuaded that the lodestar adjustment approach should be applied to fee awards under Code of Civil Procedure section 425.16, ***we are not mandating a blanket 'lodestar only' approach***; every fee-shifting statute must be construed on its own merits and nothing in *Serrano* jurisprudence suggests otherwise." *Ketchum*, 24 Cal.4th at 1136 (emphasis added).

C. Since *Serrano III*, Appellate Courts Have Repeatedly Endorsed The Percentage Method

Since *Serrano III*, this Court has repeatedly acknowledged the viability of the common fund theory as a basis for awarding attorneys' fees. *See, e.g., Trope v. Katz* (1995) 11 Cal.4th 274, 279, 45 Cal.Rptr.2d 241; *Sam Andrews' Sons v. Agricultural Labor Relations Bd.* (1988) 47 Cal.3d 157, 172 n.10, 253 Cal.Rptr. 30; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 505, 198 Cal.Rptr. 551; *Serrano v. Unruh* ("*Serrano IV*") (1982) 32 Cal.3d 621, 627, 186 Cal.Rptr. 754; *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 908, 160 Cal.Rptr. 124, *disapproved on another point in Kowis v. Howard* (1992) 3 Cal.4th 888, 12 Cal.Rptr.2d 728.

Moreover, since *Serrano III*, California appellate courts routinely apply the *percentage method* to award attorneys' fees in common fund cases. *See, e.g., In re Consumer Privacy Cases*, 175 Cal.App.4th at 558 ("It is not an abuse of discretion to choose [the percentage] method over [the lodestar method] as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace."); *Chavez*, 162 Cal.App.4th at 63 ("[F]ees based on a percentage of the benefits are . . . appropriate in large class actions when the benefit per class member is relatively low . . . ."); *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1271, 24 Cal.Rptr.3d 818 ("[A]ttorneys' fees awarded under the common fund doctrine are based on a 'percentage-of-the-benefit' analysis . . . ."); *Lealao*, 82 Cal.App.4th at 27 ("Percentage fees have traditionally been allowed in . . . common fund cases.").

D. The Authorities Mr. Brennan Cites Are Inapposite, As They Are Not Common Fund Cases

Despite this Court's unambiguous approval of the common fund theory and despite numerous appellate courts acknowledging the viability of the common fund theory (whereby fees may be awarded pursuant to the

percentage method), Mr. Brennan argues that several appellate decisions compel the conclusion that the lodestar method (and not the percentage method) ***must*** be utilized to determine reasonable attorneys' fees. (AOB at 12-16). However, this argument fails, as not one of the authorities on which Mr. Brennan relies is a common fund case. As such, they do not support the conclusion that the lodestar method ***must*** be applied in common fund cases.

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

In *Lealao v. Beneficial California*, the class action settlement ***did not create a common fund***. As such, class counsel could not recover attorneys' fees based on a common fund theory. Thus, *Lealao* does not support Mr. Brennan's contention that the lodestar method must be utilized in common fund cases.

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

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

The *Lealao* Court acknowledged the difference between "fee shifting" cases and "fee spreading" cases. In *fee shifting* cases, the "responsibility to pay attorney fees is statutorily or otherwise transferred from the prevailing plaintiff or class to the defendant." *Id.* at 26. In such cases, "the primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method." *Id.* In *fee spreading* cases, a settlement or adjudication results in the establishment of a common fund for the benefit of the class. Because the fee awarded class counsel comes from this fund, the expense is borne by the beneficiaries. *Id.* "***Percentage fees have traditionally been allowed in such common fund cases***, although . . . the lodestar methodology may also be utilized in this context." *Id.* (emphasis added).

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

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

the common fund theory because the class benefits were not in the form of a common fund. *Id.*[8]

2. *Dunk v. Ford Motor Co.* is *not* a common fund case

Mr. Brennan's reliance on *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 56 Cal.Rptr.2d 483, is also misplaced. In *Dunk* there was no common fund and no easily calculable sum of money. As such, the Court unremarkably held that the common fund theory was not an appropriate method for awarding attorneys' fees. That holding does not support the conclusion that the lodestar method must be utilized in common fund cases.

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

The appellate court reversed the fee award, concluding that "the common fund approach is improper in this case" because: (1) the fees were ***not paid from a common fund***; and (2) the value of any purported fund was not easily calculated. *Id.* at 1809-10. The *Dunk* Court specifically noted

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

that "the evidence demonstrates the attorneys were not to be paid from the 'coupon fund,' but from a distinct amount not exceeding $1.5 million." *Id.* at 1809. The *Dunk* Court ultimately clarified that it reversed the fee award because there was no common fund and no easily calculable sum of money. The Court explained that the common fund theory "should only be used where the amount was a 'certain or easily calculable sum of money.'" *Id.* In *Dunk*, the ultimate settlement value to the plaintiffs (which could be as high as $26 million) could not be determined until the one-year coupon redemption period expires. Thus, the Court concluded: "This is not the type of settlement that lends itself to the common fund approach." *Id.* at 1809 (quotation omitted).

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

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

In *Jutkowitz*, a public corporation (Bourns, Inc.), owned primarily by the Bourns family, sought to retire 10% of outstanding public shares, consisting of 265,000 shares held by 2,300 shareholders. *Id.* at 105. Jutkowitz initiated a putative class action, seeking to enjoin Bourns, Inc. from settling a class action filed by different shareholders by paying those shareholders $17.00 per share. *Id.* at 106. The trial court issued a preliminary injunction precluding Bourns, Inc. from completing a corporate transaction that *compelled* the retirement of outstanding public shares. Nevertheless, the trial court permitted Bourns, Inc. and shareholders to agree upon a price at which the shareholders could *voluntarily* sell their shares. *Id.* at 106-07. Bourns Inc. subsequently acquired 225,000 of the outstanding public shares at $24.00 per share. Thereafter, the trial court certified *Jutkowitz* as a class action, on behalf of the remaining 34,327 public shares. *Jutkowitz* then settled with each share valued at $28.75 (with

$26.00 allocated to share value and $2.75 allocated to all other shareholder claims). *Id.* at 107. Bourns, Inc. agreed not to oppose an award of attorneys' fees up to $90,000. *Id.* at 108.

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

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

The appellate court rejected this argument and affirmed the $90,000 fee award. The *Jutkowitz* Court stated: "To the extent that plaintiff's claim is grounded on the benefit he allegedly procured for the minority shareholders by raising the price from $17.00 to $24.00, it is a resort to the common fund principle which has been developed in equity." *Id.* at 109. First, the *Jutkowitz* Court noted that ***the common fund doctrine did not apply*** because there was *no attorney-client relationship*, stating that the "plaintiff's counsel did not enjoy an attorney-client relationship with the holders of the above mentioned 225,000 shares, either by direct contract or as a result of being part of the class he purported to represent." *Id.* Second, the *Jutkowitz* Court expressly (and properly) distinguished those authorities that applied the common fund doctrine on the "critical point" that in those

cases, a common "fund was created from which the attorney fees could be paid." *Id.* at 110. In other words, the *Jutkowitz* Court recognized that the common fund doctrine did not apply because ***there was no common fund*** in *Jutkowitz*. In short, the *Jutkowitz* Court did not categorically reject the common fund theory (or the percentage method). Rather, it held that the common fund theory could not provide a basis for awarding attorneys' fees in that case because: (1) there was no attorney-client relationship; and (2) no common fund was created by the litigation.

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

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

For example, in *Yuki*, the trial court awarded ***statutory*** attorneys' fees to the Yuki family in an eminent domain action. *Yuki*, 31 Cal.App.4th at 1759. The Court of Appeal reversed the fee award on the ground that it contained an improper surcharge. *Id.* at 1768-69. That holding is utterly irrelevant to the issue presently before this Court – whether the percentage method may be utilized in common fund cases.

Similarly, in *Salton Bay*, the trial court awarded ***statutory*** attorneys' fees in an inverse condemnation action based upon a contingency fee agreement. *Salton Bay*, 172 Cal.App.3d at 950-51. On appeal, the court rejected the argument that the reasonableness of the fee must be based solely on the fee arrangement between the attorney and client. *Id.* at 957. Instead, the *Salton Bay* Court held that the trial court should determine a reasonable fee by considering the time spent, a reasonable hourly rate and

other factors (such as the contingent nature of the case, its complexity and the extent the case prevented the attorney from working on other matters). *Id.* at 957-58.

Neither *Yuki* nor *Salton Bay* was a class action. Moreover, in both cases the court considered a *statutory* fee award and did not consider the award of attorneys' fees pursuant to equitable principles. Finally, neither *Yuki* nor *Salton Bay* involved the creation of a common fund, much less an award of fees based on a common fund theory. Accordingly, neither *Yuki* nor *Salton Bay* have any bearing on the central question here – whether California courts may utilize the percentage method to award attorneys' fees in common fund cases.

In sum, none of the authorities on which Mr. Brennan relies supports the conclusion that the lodestar method must be used in common fund cases. Indeed, no California appellate court has ever directly held that awarding fees based on the percentage method is inappropriate in common fund cases.

E. Selective Dicta From Various Cases Does Not Bar Use Of The Percentage Method In Common Fund Cases

Mr. Brennan's relies on selective dicta from several cases to supports his ill-conceived contention that the lodestar method must be applied in common fund cases. A careful review of the authorities on which Mr. Brennan relies demonstrates that this argument is without merit.

1. *Jutkowitz*

Mr. Brennan relies on two statements in *Jutkowitz*: (1) "in none of the 'common fund' cases . . . is there any suggestion that the size of the fund controls the determination of what is adequate compensation"; and (2) "the clear thrust of the holding in *Serrano* [*III*] . . . is a rejection of any 'contingent fee' principle in cases involving equitable compensation for lawyers in class actions or other types of representative suits." *Jutkowitz*,

118 Cal.App.3d at 110. Mr. Brennan's reliance on these excerpts is misplaced.

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

In ***dicta***, the *Jutkowitz* Court construed counsel's request for additional fees (based on the benefit to unrepresented shareholders) as an ill-conceived "attempt to engraft a 'contingent fee' concept onto the equitable common fund doctrine." *Id.* at 110. Thus, the statements in *Jutkowitz* on which Mr. Brennan relies simply rejected the adoption of contingent fee principles to award fees where: (1) counsel does not represent the parties that received a benefit; and (2) no common fund exists. The dicta in *Jutkowitz* does not repudiate the well-established rule that the common fund theory is viable method for awarding attorneys' fees.

Finally, it is worth noting that the dicta in *Jutkowitz* is based entirely on language found in ***Section V*** of the *Serrano III* opinion. *See id.* at 108,

110 (*citing Serrano III*, 20 Cal.3d at 48 n.23). As noted above, Section V of the *Serrano III* opinion (containing language regarding the "starting point" for fee awards) was made in the context of analyzing the amount of an award pursuant to the private attorney general theory. That statement was ***not*** made in connection with the common fund theory (which was discussed exclusively in Section II(a)). For this additional reasons, *Jutkowitz* did not bar the percentage method in common fund cases.

2. *Salton Bay*

Mr. Brennan next relies on the following statements in *Salton Bay*: (1) "the correct amount of compensation cannot be arrived at objectively by simply taking a percentage of that fund"; and (2) "On remand, the court should begin its analysis with a calculation of the attorney services in terms of time the attorneys actually expended on the case." *Salton Bay*, 172 Cal.App.3d at 954.

First, the initial statement is a direct quote from *Jutkowitz*. Thus, Mr. Brennan's reliance on this statement is unavailing for the same reasons his reliance on *Jutkowitz* is misplaced.

Second, *Salton Bay* involved an award of *statutory* attorneys' fees in an inverse condemnation action based upon a contingency fee agreement. *Id.* at 950-51. *Salton Bay* did not involve class action litigation and, more importantly, did not involve or consider the application of the common fund theory. Thus, the statement in *Salton Bay* concerning the calculation of fees on remand is utterly irrelevant to determining whether the percentage method may be utilized a common fund case.

Finally, as in *Jutkowitz*, *Salton Bay*'s statements are based entirely on language found in Section V of the *Serrano III* opinion. *Salton Bay*, 172 Cal.App.3d at 953-54, 957-58 (*citing Serrano III*, 20 Cal.3d at 48 n.23). Section V of the *Serrano III* opinion, however, was not related to the applicability or viability of the common fund theory. Thus, *Salton Bay*

does not support Mr. Brennan's claim that the lodestar method must be used in common fund cases.

3. *Dunk*

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

First, as noted above, *Dunk* was not a common fund case, as there was no easily calculable sum of money. *Id.* at 1809-10. As such, the Court unremarkably held that the common fund theory was not an appropriate method for awarding attorneys' fees. That holding sheds no light on the issue before this Court – whether the percentage method may be utilized to determine attorneys' fees where a common fund exists.

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

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

4. *Lealao*

Finally, Mr. Brennan relies on the following statement in *Lealao v. Beneficial California*: "[I]t [is] questionable whether a pure percentage fee can be awarded even in a conventional common fund case." *Lealao*, 82 Cal.App.4th at 39. Mr. Brennan's reliance on this dicta is also misplaced.

First, the class action settlement in *Lealao* ***did not create a common fund***. As such, the Court simply held that attorneys' fees based on the percentage method could not be awarded pursuant to a common fund theory in that case. *See id.* at 37 ("*[P]ure* percentage fees have been rejected by the California Supreme Court, at least in cases such as this in which there is not a conventional common fund"). Thus, the statement in *Lealao* concerning the percentage method in common fund cases is dicta.

Second, in questioning the percentage method in common fund cases, the *Lealao* Court relied on Section V of *Serrano III* which, as previously noted, is unrelated to the common fund theory). Thus, Mr. Brennan's reliance on *Lealao* is unavailing as it does not preclude courts from applying the percentage method in common fund cases.

In sum, no California appellate court has ever directly held that awarding fees based on the percentage method is inappropriate in common fund case.

5. The Percentage Method Provides Significant Benefits

For numerous reasons, application of the percentage method in common fund cases "makes eminently good sense." *In re M.D.C. Holdings Securities Litig.*, 1990 WL 454747, *8 (S.D. Cal. Aug. 30, 1990). As detailed below, the percentage method provides "substantial benefits to the class members and to the judiciary." Silber and Goodrich, *Common Funds And Common Problems: Fee Objections And Class Counsel's Response* ("Silber"), 17 Rev.Litig. 525, 533 (1998).

A. Administrative Ease/Conserving Scarce Judicial Resources

"[A] percentage-of-the-fund approach is less demanding of scarce judicial resources than the lodestar method." *Swedish Hosp.*, 1 F.3d at 1269; *see also Dupont Plaza*, 56 F.3d at 307 ("In complex litigation—and common fund cases, by and large, tend to be complex—the [percentage-of-the-fund] approach is often less burdensome to administer than the lodestar method."). "It is much easier to calculate a percentage-of-the-fund fee than to review hourly billing practices over a long, complex litigation." *Swedish Hosp.*, 1 F.3d at 1270; *see also Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (The percentage method "is a simpler calculation of the fee award . . . ."). "[T]he application of a percentage-of-the-fund methodology is relatively straightforward and much less time consuming." *Swedish Hosp.*, 1 F.3d at 1270; *see also M.D.C. Holdings*, 1990 WL 454747 at *8 ("use of the percentage method decreases the burden imposed upon the court by . . . the lodestar method"); Silber at 534 (The percentage method "saves judicial energy," as the court "does not have to sift through thousands of time entries and evaluate the reasonableness of both the time spent by class counsel and the hourly rate.").

B. Counsel Is Rewarded For The *Results* Obtained

"In the common fund case, . . . the monetary amount of the victory is often the true measure of success, and therefore it is most efficient that it influence the fee award." *Swedish Hosp.*, 1 F.3d at 1269. Moreover, "given the uncertainties and hazards of litigation," class counsel "must necessarily be result-oriented. It matters little to the class how much the attorney spends in time or money to reach a successful result." *Id.* In short, it is entirely appropriate to base compensation on the ***results obtained***, not the number of hours expended or resources devoured. As one court explained:

> Where success is a condition precedent to compensation, 'hours of time expended' is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour. A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more.

In re King Resources Co. Sec. Litig., 420 F. Supp. 610, 631 (D. Colo. 1976) (quotation omitted).

C. Aligned Interests Of Class Members And Class Counsel

The percentage method "aligns the interests of the counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner." *Lopez v. Youngblood*, 2011 WL 10483569, *3 (E.D. Cal. Sep. 2, 2011); *see also In re Oracle Securities Litig.* ("*Oracle I*"), 131 F.R.D. 688, 694 (N.D. Cal. 1990) ("[T]he contingent fee serves 'to align the interests of lawyer and client. The lawyer gains only to the extent his client gains.'") (quotation omitted); *see also In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 193 (E.D.Pa.2000) ("[A] larger recovery with fewer hours expended benefits all parties."). In short, "under the percentage approach, the class members and the class counsel have the same interest—maximizing the recovery of the class." Silber at 534.

D. Efficiency Is Rewarded

The percentage method "provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (quotation omitted). "One of the primary benefits of the percentage method over the lodestar method is its allowance for rewards to attorneys for efficient work

and these attorneys should be rewarded accordingly." *Jones v. Dominion Resources Services, Inc.*, 601 F.Supp.2d 756, 761 (S.D.W.Va.2009); *see also Swedish Hosp.*, 1 F.3d at 1269 (Under the percentage method, "inefficiently expended hours only serve to reduce the per hour compensation of the attorney expending them."). As one commentator explained:

> [T]he percentage approach encourages efficient use of the attorneys' time and money; excessive work does not produce an additional fee. Regardless of the number of hours expended on the case or the number of motions argued before the court, class counsel receives the same percentage of the recovery. Thus, class counsel is motivated to make the best use of legal resources because wasted time and resources reduce the net fee for the case. The efficiency of class counsel ensures that class members pay only for effective representation.

Silber at 533.

E. Reasonable Compensation At Market Value

Because the percentage method "is result-oriented rather than process-oriented, it better approximates the workings of the marketplace." *Lealao*, 82 Cal.App.4th at 48 (quotation omitted); *see also Swedish Hosp.*, 1 F.3d at 1269 (The percentage method "most closely approximates the manner in which attorneys are compensated in the marketplace for these types of cases."). "The percentage method is widely used in the legal marketplace in contingent fee agreements and better reflects what a client, at the outset of the litigation, is willing to pay." *Steiner v. Hercules Inc.*, 835 F.Supp. 771, 792 (D.Del.1993) (quotation omitted); *see also M.D.C. Holdings*, 1990 WL 454747 at *8 (The percentage method reflects the

"private marketplace where contingent fee attorneys are customarily compensated on a percentage of the recovery method.").

F. Predictability

The percentage method provides "a degree of predictability to fee awards." *In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1376 (N.D.Cal.1989); *see also In re Vioxx Products Liability Litig.*, 2013 WL 5295707, *2 (E.D.La. Sep. 18, 2013) ("courts find that the percentage method provides more predictability to attorneys and class members") (quotation omitted); *Steiner*, 835 F.Supp. at 792 (The percentage method "is predictable and allows all parties to know what the attorneys' compensation will be.") (quotation omitted). As a result, both class counsel and class members can "rationally decide the propriety of pursuing an action based on a prediction of their expected recoveries." Monique Lapointe, Note, *Attorney's Fees in Common Fund Actions*, 59 Fordham L.Rev. 843, 867 (1991); *see also* Silber at 533 (The percentage method also "permits class counsel to develop reasonable expectations concerning the likely fee recovery so that the attorney is more willing to invest time and money in the class action.").

G. Prompt Payment

The percentage method "assures that class members do not experience undue delay in receiving their share of the proceeds of the settlement due to protracted fee proceedings." *M.D.C. Holdings*, 1990 WL 454747 at *8. Similarly, "the savings in time borne by use of a percentage approach would 'reduce the delay period between the settlement of a common fund case and the award of fees to counsel.'" *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 886 F.Supp. 445, 460 (E.D.Pa.1995) (quotation omitted).

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6. Requiring Courts To Apply The Lodestar Method In Common Fund Cases Will Create Significant Problems

To say that the lodestar method has been criticized (particularly when compared to the percentage method) is an understatement. The lodestar method provides utterly "rudderless standards." *In re Oracle Securities Litig.* ("*Oracle II*"), 136 F.R.D. 639, 650 n.25 (N.D. Cal. 1991). Indeed, the lodestar method has been "thoroughly discredited by experience." *Oracle I*, 131 F.R.D. at 689.

One federal district court explained that the lodestar method is "unworkable" because, *inter alia*, it: (1) abandons the adversary process; (2) requires judges to make an after-the-fact assessment of class counsel's strategic decisions during litigation; (3) further delays the recovery of class members; and (4) requires the court to set aside its impartiality and champion the interests of some litigants. *Id.*

Another federal district court noted that the lodestar method has numerous additional, significant drawbacks, including: (1) it "increases the amount of fee litigation"; (2) it "lacks objectivity"; (3) it "can result in churning, padding of hours, and inefficient use of resources"; (4) it provides a disincentive to early settlement because it "reduces the amount of time available for the attorneys to record hours"; and (5) it "inadequately responds to the problem of risk." *Lopez*, 2011 WL 10483569 at *4.

Yet another district court pointedly stated that the lodestar method "does not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work and protracting the litigation. It adds to the work load of already overworked district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process." *Activision*, 723 F.Supp. at 1378.

In sum, "when compared to the murky criteria of the lodestar approach, contingent fee compensation is vastly superior." *Oracle I*, 131

F.R.D. at 694. Some of the numerous deficiencies in the lodestar method are detailed below.

A. The Lodestar Method Imposes A "Massive Time Burden" On Scarce Judicial Resources

"The lodestar method makes considerable demands upon judicial resources since it can be exceptionally difficult for a court to review attorney billing information over the life of a complex litigation and make a determination about whether the time devoted to the litigation was necessary or reasonable." *Swedish Hosp.*, 1 F.3d at 1269-70. "[C]onvoluted judicial efforts to evaluate the lodestar, and see to it that the lodestar hours were reasonable and necessary, and that the case was not overmanned or the time overbooked, are extremely difficult to say the least, and unrewarding. Such efforts produce much judicial papershuffling, in many cases with no real assurance that an accurate or fair result has been achieved." *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F.Supp. 160, 165 (S.D.N.Y.1989). Moreover, in common fund cases, "the court becomes the fiduciary for the fund's beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing the fee applications." *Skelton v. General Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988). "[T]he court receives little help in performing this cumbersome task." Lapointe at 847; *see also Activision*, 723 F.Supp. at 1374 ("the court is abandoned by the adversary system and left to the plaintiff's unilateral application").[9]

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[9] As the Seventh Circuit aptly noted: "The 'lodestar' method makes of the court a public utilities commission, regulating the fees of counsel after the services have been performed, thereby combining the difficulties of rate regulation with the inequities of retrospective rate-setting." *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986).

B. The Lodestar Method Encourages Excessive Billing And Padded Hours

"[T]he lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002). Under the lodestar method, "attorneys are given incentive to spend as many hours as possible, billable to a firm's most expensive attorneys." *Swedish Hosp.*, 1 F.3d at 1268; *see also Dupont Plaza*, 56 F.3d at 307 (Under the lodestar method, attorneys "have a monetary incentive to spend as many hours as possible (and bill for them) . . . ."); *Feuerstein v. Burns*, 569 F.Supp. 268 (S.D. Cal. 1983) (criticizing the lodestar method for "overemphasizing the number of hours expended, and thus allowing counsel to artificially inflate attorneys' fees requests"). Moreover, "the attorney inefficiently expending an excess amount of time does stand to gain by that inefficiency . . . ." *Swedish Hosp.*, 1 F.3d at 1269.

C. The Lodestar Method Discourages Early Settlement

Under the lodestar method "there is a strong incentive against early settlement since attorneys will earn more the longer a litigation lasts." *Swedish Hosp.*, 1 F.3d at 1268; *see also Vizcaino*, 290 F.3d at 1050 n.5 ("the lodestar method does not reward early settlement"); *Dupont Plaza*, 56 F.3d at 307 (Under the lodestar method, counsel "face a strong disincentive to early settlement.").

D. The Lodestar Method Results In Substantial Delay

The lodestar approach also "often results in a substantial delay in distribution of the common fund to the class" and class counsel. *Swedish Hosp.*, 1 F.3d at 1270.

> The lodestar procedure requires detailed involvement by the District Court, evaluating the reasonableness of expenditure of attorney time and effort, and making comparative inquiries

> on reasonable rates for those services. Given the complexity of many class action lawsuits, combined with the degree of detailed review required and considering the heavy workload of most district court judges, lodestar calculation is likely to cause significant delay between the creation of a common fund and remuneration of class counsel.

Id.

Here, the dispute over fees (prosecuted by one objector out of a class of nearly 4,000 employees) has spawned a second major litigation. It has also deprived class members of the fruits of this litigation. Such a result is particularly disturbing as the parties reached a settlement **more than 3 years ago** and the trial court approved the settlement **more than two years ago**.

For all these reasons, there are ample policy reasons for this Court to conclude that it should permit California courts to continue to apply the percentage method in common fund cases.

7. Courts Needs Flexibility To Award Reasonable Attorneys' Fees

When trial courts are tasked with determining a reasonable attorney fee, they require great flexibility, not rigid uniformity. For this additional reason, this Court should approve the continuing use of the percentage method as a permissible means for ensuring that a fee awarded is ***reasonable***. *See In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Lit.*, 109 F.3d 602, 607 (9th Cir. 1997) ("Reasonableness is the goal, and mechanical or formulaic application of either [the percentage method or the lodestar] method, where it yields an unreasonable result, can be an abuse of discretion."); *see also In re Wachovia Corp. ERISA Litig.*, 2011 WL 7787962, *2 (W.D.N.C. Oct. 24, 2011) ("The percentage method also gives courts 'more flexibility to award attorneys for the efficient settlement of a case.'") (quotation omitted); Newberg, § 13:80

at 498 ("Giving trial courts the flexibility to decide between percentage and lodestar allows the fairest determination of reasonable attorney's fees in each situation.").

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

This Court should confirm that trial courts continue to have the discretion to apply the percentage method to award attorneys' fees in common fund cases. Moreover, the exercise of such discretion is plainly proper where, as here, the trial court also performed a lodestar cross-check to confirm that its application of the percentage method to award attorneys' fees was reasonable.

8. This Court Should Ignore Mr. Brennan's Additional Arguments Concerning How Courts Should Apply The Lodestar Method

This Court identified a single issue – whether a trial court may "anchor its calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered." Inexplicably, Mr. Brennan spends ***23 pages*** arguing that California courts (including the

Laffitte Court) fail to properly apply the *lodestar* method. (AOB at 20-42). Mr. Brennan goes even further, arguing that this Court should identify certain documents as "required submissions" when applying the lodestar method. (AOB at 49-53).[10] These matters are far beyond the scope of the limited issue raised before this Court. These matters were also not litigated in either the appellate court or the trial court. For this reason alone, the Court should ignore these additional, irrelevant arguments.

Mr. Brennan also ignores the irony of his argument. Mr. Brennan complains that the lodestar method "can be manipulated" and that California courts have "ignored" the lodestar requirements. (AOB at 18-19). Assuming these arguments have some merit, they would actually ***support*** utilization of the percentage method in common fund cases. The percentage method is easy to administer, conserves judicial resources, rewards counsel for the results obtained, aligns the interests of counsel and the class, rewards efficiency, provides reasonable compensation at market value and is predictable (before litigation commences). Thus, Mr. Brennan's lengthy diatribe against the manner in which the lodestar method is applied only bolsters the conclusion that this Court should require (if not, at least permit) California courts to utilize the percentage method to award fees in common fund cases. In sum, the percentage method avoids each of the perceived harms arising from the application of the lodestar method.

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[10] For example, Mr. Brennan argues that this Court must require trial courts to appoint a "class guardian" to ease the burden on courts applying the lodestar method. (AOB at 45-47). Mr. Brennan also presents a "wish list" of items which he believes that this Court should unilaterally require in all future fee awards (pursuant to the lodestar method), including: (1) a prohibition on the discussion of fees between class counsel and defendants; (2) changing the reasonable hourly rate standard to a competent or capable attorney's standard; (3) eliminating multipliers (or modifying them in contingent fee litigation); and (4) limiting enhancements for quality of performance. (AOB at 54-59).

Finally, Mr. Brennan's myopic focus on the "starting point" for fee awards fails to explain why the lodestar method must be used ***first*** where, as here, the trial court utilized both methods (the percentage method with a lodestar cross-check) and concluded that both methods resulted in an identical fee award. In other words, if the trial court had applied the lodestar method first and applied the percentage method as a cross-check, the result would have been the same and the trial court would have awarded the requested fees. *See, e.g.*, *Chavez*, 162 Cal.App.4th at 66 n.11 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.") (quotation omitted); *Consumer Privacy Cases*, 175 Cal.App.4th at 558 n.13 (same).

CONCLUSION

For all these reasons, this Court should affirm the appellate court's opinion and hold that California courts may anchor the calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered.

Dated: August 25, 2015

LAW OFFICE OF KEVIN T. BARNES
LAW OFFICES OF JOSEPH ANTONELLI
HILAIRE MCGRIFF PC

By 
KEVIN T. BARNES
Attorneys for Class Plaintiff and Respondent
MARK LAFFITTE

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, the Answer Brief On The Merits (Class Plaintiff And Respondent Mark Laffitte) is proportionately spaced, has a typeface of 13 points or more and contains 13,821 words, including footnotes as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: August 25, 2015

LAW OFFICE OF KEVIN T. BARNES
LAW OFFICES OF JOSEPH ANTONELLI
HILAIRE MCGRIFF PC

By 
KEVIN T. BARNES
Attorneys for Class Plaintiff and Respondent
MARK LAFFITTE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

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ANSWER BRIEF ON THE MERITS (CLASS PLAINTIFF AND RESPONDENT MARK LAFFITTE)

on the interested parties in this action, addressed as follows:

Attorneys for Defendants:

M. Kirby C. Wilcox, Esq. / *
PAUL HASTINGS LLP
55 Second Street, 24th Floor
San Francisco, CA 94105
Tel.: (415) 856-7000 / Fax: (415) 856-7100
Email: KirbyWilcox@paulhastings.com

Judith M. Kline, Esq. / *
PAUL HASTINGS LLP
515 South Flower Street, 25th Floor
Los Angeles, CA 90071
Tel.: (213) 683-6000 / Fax: (213) 627-0705
Email: JudyKline@paulhastings.com

Attorneys for Plaintiffs:

Joseph Antonelli, Esq. / **
Janelle Carney, Esq.
LAW OFFICE OF JOSEPH ANTONELLI
14758 Pipeline Avenue, Suite E
Chino Hills, CA 91709-6025
Tel.: (909) 393-0223 / Fax: (909) 393-0471
Email: JAntonelli@antonellilaw.com

Mika M. Hilaire, Esq. / **
HILAIRE MCGRIFF PC
601 S. Figueroa Street, Suite 4050
Los Angeles, CA 90017
Tel: (213) 330-4260 / Fax: (213) 402-5577
Email: Mika@hilairemcgriff.com

Attorney for Objector David Brennan:

Lawrence W. Schonbrun, Esq. / *
LAW OFFICE OF LAWRENCE W. SCHONBRUN
86 Eucalyptus Road
Berkeley, CA 94705
Tel.: (510) 547-8070 / Fax: (510) 923-0627
Email: Lschon@inreach.com

Myron Moskovitz, Esq. / *
90 Crocker Avenue
Piedmont, CA 94611
Tel: (510) 384-0354
Email: MyronMoskovitz@gmail.com

Honorable Mary H. Strobel / ***
Los Angeles Superior Court
111 North Hill Street, Dept. 32
Los Angeles, CA 90012-3014

Clerk, Court of Appeal / ***
Second Appellate District
300 South Spring Street
Los Angeles, CA 90013-1230

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Executed on August 26, 2015, at Los Angeles, California.

Cindy Rivas

BARNES
LSHIRE
TH 1460
LES, CA
5614
549-9100
549-0101