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NO. S222996

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARK LAFFITTE, *et al.*,

Plaintiffs and Respondents,

vs.

ROBERT HALF INTERNATIONAL, INC., *et al.*,

Defendants and Respondents,

DAVID BRENNAN,

Plaintiff and Appellant.

After a Decision of the Court of Appeal,
Second Appellate District, Div. Seven, No. B249253;

Los Angeles Superior Court, Stanley Mosk Courthouse, Case No. BC 321317
[related to BC 455499 and BC 377930],
Hon. Mary H. Strobel, Presiding Judge, Dept. 32

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

It is clear from the parties' briefing that there is no agreement about the standard that this Court established in *Serrano III*[1] regarding the methodology required for judicial calculations of the amount reasonable attorneys' fee awards to be paid from class action common fund recoveries.

The simple direct answer to the Court's question,

> Does this Court's seminal decision in *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?

is No.

But for reasons explained herein, answering that question does not address the fact that the federal case authorities cited in support of this Court's 1977 decision are no longer valid precedent. Thusly, this Court has the opportunity to reconsider *Serrano III* and establish a fee calculation methodology for class actions in the 21st century.

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[1] *Serrano v. Priest* (hereinafter *Serrano III)*, 20 Cal.3d 25 [141 Cal.Rptr. 315] (Oct. 4, 1977).

I.

THIS COURT'S DECISION IN *SERRANO III* REQUIRES THAT JUDICIAL AWARDS OF REASONABLE ATTORNEYS' FEES FROM CLASS ACTION COMMON FUNDS MUST BE ANCHORED TO THE LODESTAR-MULTIPLIER APPROACH

A. *Serrano III's* Requirements Are Clear and Unambiguous.

Appellant Brennan is firmly convinced that this Court will come to the conclusion that his analysis is correct, and that *Serrano III* stands for the following propositions:

1. California recognizes the prevailing attorneys' fee jurisprudence of the American rule – the general policy regarding each party's responsibility for the payment of his or her attorneys' fees.

2. California also recognizes three equitable exceptions to the American rule: the common fund theory, the substantial benefit theory, and the private attorney general concept (*Serrano III,* 20 Cal.3d at 42-43). These exceptions permit a court to award a reasonable attorneys' fee to a successful plaintiff for his or her counsel's efforts.

3. *Serrano III* instructs that the awarding of reasonable attorneys' fees is a two-step process.

(a) First, the court must determine whether counsel has established the eligibility of the plaintiffs for an award under one of the three recognized equitable exceptions. *Serrano III*, *supra*, at 31-32.

(b) Second, the trial court. using its historic power in equity, must calculate the amount of the fee to be awarded.

4. *Serrano III* instructs how the amount of the fee must be calculated. It holds that California courts, in calculating a reasonable attorneys' fee, must "anchor the fee award" to the "attorneys' services" provided to the client, in other words, it must use the lodestar-multiplier approach.

> ["The starting point of every fee award,] [once it is recognized that the court's role in equity is to provide just compensation for the attorney,] [must be a calculation of the attorney's services in terms of the time he has expended on the case.] [Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."]

Serrano III, 20 Cal.3d at 49 n.23 (citation omitted).

(a) In calculating the amount of a reasonable attorneys' fee, *Serrano III* requires:

> [A] careful compilation of the time spent and reasonable hourly compensation of each attorney....

Ibid. at 48.

(b) The Court explained why this anchoring to attorneys' services is required:

(i) Objectivity:

> "Anchoring the analysis to this concept [actual time expended] is the only way of approaching the problem that can claim objectivity...."

Ibid. at 49 n.23, *citing City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).

(ii) The prestige of the bar and the courts:

"[O]bjectivity, a claim which is obviously vital to the prestige of the bar and the courts."

Ibid. (emphasis added). As restated in *Jutkowitz v. Bourns, Inc., et al.*, 118 Cal.App.3d 102 [173 Cal.Rptr. 248] (2d App. Dist. Apr. 16, 1981):

[F]avorable public perception and the prestige of the legal profession and our system of justice....

Id. at 111 (emphasis added), *relying on Serrano III, supra.*

(iii) Just compensation.

"[T]he court's role in equity is to provide just compensation for the attorney ... in terms of the time he has expended on the case."

Serrano III, 20 Cal.3d at 49 n.23 (citation omitted; emphasis added).

(c) In support of this methodology, *Serrano III* references two federal common fund cases, *City of Detroit v. Grinnell Corp.* (hereinafter *Grinnell*),[2] and *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp., et al.* (hereinafter *Lindy Bros.*),[3] of which the former specifically rejects the calculation of an award of reasonable attorneys' fees based on contingency principles of the percentage-of-the-benefit approach.

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[2] 495 F.2d 448 (2d Cir. Mar. 13, 1974).
[3] 487 F.2d 161 (3d Cir. Oct. 31, 1973).

> Because we feel that this fee ... displayed too much reliance upon the contingent fee syndrome....

Grinnell, 495 F.2d at 468.

B. The Arguments Raised by Class Counsel in Support of Their Contention that *Serrano III* Permits the Anchoring of a Reasonable Attorneys' Fee Award to the Percentage Approach Are, at Best, Misguided.

1. Appellant Brennan believes he can persuasively demonstrate why Class Counsel's analysis is wrong and why *Serrano III's* instructions are clear and include all equitable circumstances, not just the private attorney general exception.

The language used by the Court,

(a) "The starting point[4] of every fee award," and

(b) "once it is recognized that the court's role in equity..."

(*Serrano III*, 20 Cal.3d at 49 n.23 (citation omitted; emphasis added)),

compels this conclusion.

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[4] Class Counsel criticize Appellant Brennan for a "myopic focus on the 'starting point'" language (Class Plaintiff and Respondent Mark Laffitte's Answer Brief on the Merits (hereinafter "ABM"), at 46). Mr. Brennan does not apologize for seeking to enforce *Serrano III's* holding by referencing the language used by this Court. But the true myopia exhibited in the briefing is not Mr. Brennan's, but rather Class Counsel's mantra that such and such a case "is not a common fund case."

2. Class Counsel's argument is that the holding in *Serrano III* does not apply to the calculation of a reasonable attorneys' fee under the common fund exception because "*Serrano III* was not a common fund case" (Class Plf's ABM at 19), and that *Serrano III* only applied to the private attorney general exception.

Their argument, indeed mantra,[5] that *Serrano III* (and other cases cited by Appellant Brennan) did not involve a fee award under the common fund doctrine is an attempt to obfuscate the issue.

> However, this argument fails, as not one of the authorities on which Mr. Brennan relies is a common fund case.

(Class Plf's ABM at 25.)

Mr. Brennan responds:

(a) Class Counsel provide no case support or legal authority that has ever adopted an interpretation that there is a difference in how equitable principles are applied in awarding reasonable attorneys' fees, depending on whether entitlement to the reasonable fee is being awarded under the common fund theory or under the private attorney general theory.

(b) The words of *Serrano III's* instructions cover the general topic of the equitable power of the court in awarding reasonable attorneys' fees without respect to which exception entitles the plaintiffs to a fee award:

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[5] "*Dunk v. Ford Motor Co. is not* a common fund case"; *Jutkowitz v. Bourns* is not a common fund case" (Class Plf's ABM at 27 and 28 respectively); "Mr. Brennan's reliance on *Ketchum* is misplaced, as it was *not a common fund case*." (Class Plf's ABM at 23 n.7; emphasis in original.)

> "[O]nce it is recognized that the court's role in equity is to provide just compensation for the attorney...."

Serrano III, 20 Cal.3d at 49 n.23 (emphasis added).

(c) The fact that *Serrano III* (and *Lealao v. Beneficial California, Inc.*;[6] *Jutkowitz v. Bourns, Inc., et al.*;[7] *Salton Bay Marina, Inc., et al. v. Imperial Irrigation Dist.*;[8] *The People ex rel. Department of Transportation v. Yuki, et al.*,[9] cited by Appellant), is not itself a case in which the court found entitlement to a fee award under the common fund exception is simply not germane to *Serrano III's* larger discussion of a court's use of its equitable power.

(d) There is simply nothing in *Serrano III* that even hints that the method of calculation of the amount of a reasonable attorneys' fee depends on whether entitlement is found under the common fund or private attorney general theories. On the contrary, the broad language of *Serrano III's* "The starting point of every fee award," and "the court's role in equity," suggests just the opposite. *Serrano III*, 20 Cal.3d at 49 n.23 (citation omitted; emphasis added).

(e) Class Counsel provide absolutely no rationale that explains why the awarding of a reasonable attorneys' fee

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[6] 82 Cal.App.4th 19 [97 Cal.Rptr.2d 797] (1st App. Dist. July 10, 2000).

[7] 118 Cal.App.3d 102 [173 Cal.Rptr. 248] (2d App. Dist. Apr. 16, 1981).

[8] 172 Cal.App.3d 914 [218 Cal.Rptr. 839] (4th App. Dist. Sept. 30, 1985).

[9] 31 Cal.App.4th 1754 [37 Cal.Rptr.2d 616] (6th App. Dist. Jan. 6, 1995) (hereinafter *Yuki*).

under the equitable common fund exception or the equitable substantial benefit exception should be any different than the calculation of the amount of a reasonable attorneys' fee under the equitable private attorney general exception. There is no explanation, for example, of why the principles of *Serrano III* – the importance of objectivity, the public's respect for the prestige of the judiciary, the integrity of the bar, and just compensation – would apply to one circumstance, the private attorney general theory, but not to the other, the common fund doctrine. The doctrines are similar. Both provide compensation when groups of people other than the immediate parties are benefitted by litigation.

3. Class Counsel make much of the fact that the anchor-the-fee to the lodestar discussion appears in Section V of the *Serrano III* opinion (*Serrano III*, 20 Cal.3d at 48-49) regarding the private attorney general exception. But this is unremarkable; it follows from the fact that it was that exception which the Court ruled entitled Class Counsel to a fee award. Nothing in the discussion in Section V suggests that its anchoring instruction applies only when the fee is awarded under the private attorney general theory.

4. The common benefit, common fund, and private attorney general exceptions are entitlement questions. They are unrelated to the method to be used to calculate the amount of the attorneys' fee. Class Counsel confuse Step 2, the method to calculate the amount of the fee, with Step 1, entitlement to a fee:

> [D]espite numerous appellate courts acknowledging the viability of the common fund theory (whereby fees may be awarded pursuant to the percentage method)....

(Class Plf's ABM at 24-25.) Contrary to Class Counsel's argument, the common fund doctrine is not shorthand for the percentage approach.

5. It is true that *Serrano III* can be distinguished from *Laffitte*[10] based on the distinction that two different exceptions are involved. But whether it is the common fund, private attorney general, or substantial benefit exception is not a significant circumstance as regards the court's equitable power. Class Counsel's argument,

> 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.

(Class Plf's ABM at 22), is incorrect. The context was awarding a fee pursuant to the equitable exceptions to the American rule.

By the same logic, Class Counsel could argue that *Serrano III's* "the starting point" language was "made in connection with" a public school financing" case while *Laffitte* involves employment law. Or, that *Serrano III's* instruction, "the starting point," was "made in connection" with public interest law firms seeking fees, while in *Laffitte* the law firms are private.

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10 *Laffitte v. Robert Half Int'l, Inc., et al.; David Brennan, Plaintiff and Appellant* (hereinafter *Laffitte*), 231 Cal.App.4th 860 [180 Cal.Rptr.3d 136], 2014 Cal.App. LEXIS 1059 (2d App. Dist. Oct. 29, 2014).

The Court's answer regarding the observation that *Lindy Bros., supra,* and *Grinnell, supra,* were antitrust cases applies to Class Counsel's argument regarding the common fund theory vs. the private attorney general theory:

> [A]lthough uttered in the context of an antitrust class action, are wholly apposite here [in the context of school financing litigation]....

Serrano III, 20 Cal.3d at 49 n.23, i.e., "although uttered in the context of" the application of the private attorney general exception, are wholly apposite to the common fund exception.

6. If Class Counsel's argument were correct and *Serrano III's* anchoring language refers only to fees awarded under the private attorney general exception:

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

(Class Plf's ABM at 21), it would have made no sense for this Court to cite to fee awards from *Lindy Bros.* and *Grinnell,* both made pursuant to the common fund doctrinal exception.

Appellant Brennan believes this Court would not have relied upon common fund cases to support its instructions if it had meant to exclude common funds from *Serrano III's* reach. And if it had meant to exclude common fund settlements from its instructions, the Court certainly would have expressly stated so in its opinion.

7. Class Counsel argue that the anchoring instruction mandated in *Serrano III* (and numerous other courts of appeal cases) is *dicta* as regards fee awards under the common fund exception.

> That dicta, however, did *not* apply to common fund cases.

(Class Plf's ABM at 2.)

> (... [T]he "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....)

(Class Plf's ABM at 33, *referencing Serrano III*, Section V.)

To begin with, Class Counsel's Answer Brief makes numerous claims of *dicta* (Class Plf's ABM at 2, 10, 31, 32, 34, 35), but provides no citation to case law or legal authority on what constitutes *dicta*. Class Counsel just assert the term without legally defining it. This Court has explained:

> Statements by appellate courts "responsive to the issues raised on appeal and ... intended to guide the parties and the trial court in resolving the matter following ... remand" are not dicta.

Sonic-Calabasas A., Inc. v. Moreno, 57 Cal.4th 1109, 1158 [163 Cal.Rptr.3d 269] (Oct. 17, 2013) (citation omitted).

Because this Court's seminal *Serrano III* decision was instructing courts on how to exercise their equitable power generally to calculate a fee under an equitable exception, the instruction is not *dicta* as applied to the equitable common fund exception.

For example, imagine three houses that are involved in a construction defect litigation: one is painted green, one is painted blue, and the third is painted white. All are part of a subdivision.

A homeowner claims a construction defect for his house, which is painted white. The court concludes that there is a construction defect. Could the defendant-home builder then argue that the construction defect holding is *dicta* regarding the houses painted green and blue?

8. Last but not least, when examined closely, Class Counsel's arguments make no sense.

The very cases cited by Class Counsel acknowledge that from an historical perspective at the time *Serrano III* was decided, the lodestar approach replaced the percentage approach in common fund cases!

(a) Class Counsel's Answer Brief cites to *Lealao, supra,* which acknowledges this historical context as follows:

> In this context, this Court issued its decision in *Serrano III* in 1977.

(Class Plf's ABM at 10 n.2.)

And, the context being referred to was common fund cases:

> Adoption of the lodestar methodology in the early 1970s was stimulated by the view that awards based on a reasonable percentage of the fund, historically the preferred method of fee setting in common fund cases, was yielding fee awards that were excessive and unrelated to the work actually performed by counsel.

Lealao, 82 Cal. App. 4th at 28 n.2 (emphasis added).

(b) Class Counsel cite to *Swedish Hospital Corp. v. Donna E. Shalala, Secretary of Health and Human Services*, 1 F.3d 1261 (D.C. Aug. 10, 1993), which acknowledges an historical shift at the time of *Serrano III* from the percentage approach to the lodestar approach:

> "'[S]hifted the emphasis from a fair percentage of recovery to the value of the time expended by counsel."

(Class Plf's ABM at 10, *citing Swedish Hosp.*, 1 F.3d at 1266.)

(c) Class Counsel cite to *Strawn v. Farmers Ins. Co. of Oregon*, 353 Ore. 210, 297 P.3d 439 (Feb. 22, 2013), which acknowledges that common fund cases, state and federal, were returning to the percentage approach from the lodestar approach, which was prominent at the time of *Lindy Bros., Grinnell,* and *Serrano III.*

> "In common fund cases, ... federal and state courts alike have increasingly returned to the percent-of-fund approach,..."
>
> (Class Plf's ABM at 15, *citing Strawn v. Farmers Ins. Co. of Oregon, supra*, 353 Ore. at 219.)

The return to the percentage approach was from the prevailing lodestar methodology.

(d) Class Counsel's Answer Brief includes an alphabetical list of states that permit or require the percentage approach – Arizona is followed by Colorado, and Connecticut (Class Plf's ABM at 16). Noticeably absent from Class Counsel's list is the state of California. If *Serrano III* permitted the percentage approach

to be used in common fund cases, as Class Counsel contend it had, why have they not have included California in their list?

(e) Class Counsel's Answer Brief asks this Court to follow the "nearly universal trend" (Class Plf's ABM at 5) that permits percentage fee calculations. Why would it be necessary to ask this Court to follow a federal and state trend if this Court had permitted use of the percentage calculation in *Serrano III* in 1977?

(f) Class Counsel's Answer Brief acknowledges the significance of *Lindy Bros., supra,* and *Grinnell, supra,* as relevant to common fund fee awards, but their position in this case contradicts those cases.

Lealao states:

> [W]hose 1973 opinion in *Lindy I, supra, 487 F.2d 161,* which was relied upon in *Serrano III (20 Cal.3d at p. 49, fn. 23)....*

Lealao, *supra,* 82 Cal.App.4th at 28.

> Similarly, in *Lindy Bros.*, the Third Circuit initially set forth the lodestar method as the means to determine reasonable attorneys' fees.
> ....
> Thus, to the extent *City of Detroit* and *Lindy Bros.* previously adopted the lodestar method in common fund cases,

(Class Plf's ABM at 23; emphasis added.)

(g) Class Counsel argue that *Serrano III's* instruction, which references federal case law, i.e., *Lindy Bros.* and *Grinnell*, has changed since 1977 and now permits percentage fee calculations.

They acknowledge that federal court cases relied upon by *Serrano III* did not change until the year 2000:

> In 2000, however, the Second Circuit *abrogated City of Detroit* [*v. Grinnell*] and expressly approved the percentage method....

(Class Plf's ABM at 23, the Third Circuit's *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. Mar. 28, 2000).[11])

And in 2001, *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 734 (3d Cir. Mar. 21, 2001), approved the percentage-of-recovery method, invalidating *Lindy Bros.* (Class Plf's ABM at 23 and 13.) These subsequent changes in federal law did not change what *Lindy Bros.* and *Grinnell* held in 1977 when *Serrano III* adopted them.

Thusly, Class Counsel concluding statement is a non sequitur.

> 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.

(Class Plf's ABM at 23.)

In conclusion, while it is true that *Serrano III* found an entitlement to an award of reasonable attorneys' fees under the private attorney general theory and not the common fund doctrine, *Serrano III's* language and the context of the Court's decision are not limited to a fee calculation under the private attorney general exception.

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[11] Note that although permitting the percentage approach, the fee approved by the court was 4%: "Nor does the award of a fee of about 4% constitute an abuse of discretion." *Goldberger,* 209 F.3d at 53.

Serrano III relates generally to a broad judicial exercise of a court's equitable power when any one of the three exceptions exists. There is no indication in *Serrano III* that the equitable power is exercised differently, depending upon which exception entitles a plaintiff to a fee award.

C. The Most Class Counsel Can Argue Is That in 1977, This Court Relied on Two Federal Cases That Banned Percentages in Common Fund Cases, Which Cases Have Been Overruled.

In the intervening years since *Serrano III,* the Third Circuit (*Grinnell*) and the Second Circuit (*Lindy Bros.*) have reconsidered and reversed those decisions. Thusly, Class Counsel could legitimately argue that this Court may choose to reconsider its *Serrano III* decision. The fact, in Class Counsel's words, that these "decisions that are <u>no longer</u> reliable" (Class Plf's ABM at 2), says nothing about what these decisions held in 1977 when they were reliable and adopted by *Serrano III.*

The "no longer reliable" argument is irrelevant to the fact that in 1977 *Serrano III* forbade (following the Second and Third Circuits in 1977) the anchoring of a reasonable fee award in a common fund case to the percentage approach. What the federal courts (and other state courts) have done in the 40 years since the *Serrano III* decision is not relevant to what this Court ruled in 1977, which is still California law.

Class Counsel's observation:

> In short, the time has come for this Court to fully endorse the percentage method in common fund cases.

(Class Plf's ABM at 3), could not be more misleading. Since 1977, this Court has never endorsed the percentage method as an anchor for judicial awards of reasonable attorneys' fees. Just the opposite!

II.

THE CASES CITED BY CLASS COUNSEL TO REFUTE CLASS MEMBER BRENNAN'S ARGUMENTS ARE BEING MISINTERPRETED

A. Class Counsel misunderstand the significance of the cases they cite.

It is true that *Serrano III, supra, Dunk v. Ford Motor Co.*,[12] *Lealao, supra, Yuki, supra, Salton Bay, supra,* and *Jutkowitz, supra,* among others, were not cases in which a fee was ultimately awarded based on the common fund doctrine exception. However, the language in these cases clearly demonstrates that each of these courts understood that *Serrano III's* instruction was not limited to fee awards under the private attorney general exception. Rather, that *Serrano III* was applicable whenever a reasonable attorneys' fee was sought under an equitable exception to the American rule.

Appellant Brennan will briefly comment on each of the cases cited by Class Counsel. As most of these cases were cited in the Second District's *Laffitte* decision (231 Cal.App.4th 860, 2014 Cal.App. LEXIS 1059), they have been covered in Appellant Brennan's Petition for Review (hereinafter "Appellant's PR") and

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[12] *Dunk v. Ford Motor Co., et al.*, 48 Cal.App.4th 1794 [56 Cal.Rptr.2d 483] (4th App. Dist. Aug. 30, 1996).

Opening Brief on the Merits (hereinafter "Appellant's OBM"). Rather than restating what is in the these earlier briefs, Appellant Brennan will refer the Court to his prior pleadings for more detailed responses.

1. *Apple Computer, Inc.*

Apple Computer, Inc. v. The Superior Court of Los Angeles County, et al. 126 Cal.App.4th 1253 [24 Cal.Rptr.3d 818] (2d App. Dist. Feb. 17, 2005), did not involve an actual calculation of a reasonable attorneys' fee. The statement:

> [A]ttorneys' fees awarded under the common fund doctrine are based on a 'percentage-of-the-benefit' analysis....,[13]

is truly *dicta*. The issue in *Apple* was a defendant's attempt to disqualify a law firm from acting as class counsel. There is no citation to or discussion of *Serrano III*. Indeed, *Apple Computer* cites to federal fee jurisprudence. (*Apple Computer* at 1270, *citing to Brytus v. Spang & Co.*, 203 F.3d 238, 247 (3d Cir. Feb. 7, 2000).)

For a more thorough discussion on *Apple Computer*, see Appellant's PR at pages 23 and 24.

2. *Yuki* and *Salton Bay*.

It is true that neither *The People ex rel. Department of Transportation v. Yuki, supra,* 31 Cal.App.4th 1754, nor *Salton Bay, supra,* 172 Cal.App.3d 914, involve the application of the percentage approach to a common fund.

However, the quotations from *Yuki* and *Salton Bay* arise out of *Serrano III's* instructions and make it clear that those courts

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[13] Class Plf's ABM at 24, *citing Apple Computer, supra,* at 1270.

believed *Serrano III* applied to all fee awards, i.e., common fund and private attorney general, class action and non-class action.

For a more thorough discussion on *Yuki*, see Appellant's PR at 21. For a more thorough discussion on *Salton Bay*, see Appellant's PR at 21, and Appellant's OBM at 13.

3. *Jutkowitz.*

In reading *Jutkowitz v. Bourns, supra,* 118 Cal.App.3d 102, it is clear that the question of whether the fee was being awarded pursuant to the common fund exception was not germane to *Serrano III's* anchoring instruction.

> Significantly, in none of the "common fund" cases, whether class actions or nonclass actions ... is there any suggestion that *the size of the fund controls the determination of what is adequate compensation.*

Jutkowitz, supra, 118 Cal.App.3d at 110 (underline added).

Class Counsel's summation of *Jutkowitz* cannot be squared with what that court actually held:

> In short, the *Jutkowitz* Court did not categorically reject the common fund theory (or the percentage method).

(Class Plf's ABM at 30.)

For a more complete discussion of *Jutkowitz*, see Appellant's PR at 20, and Appellant's OBM at 13.

4. *Dunk.*

Class Counsel acknowledge that *Dunk v. Ford Motor Co., supra,* 48 Cal.App.4th 1794, held:

> (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."

(Class Plf's ABM at 34, *citing Dunk*, 48 Cal.Rptr.4th at 1809; emphasis added.)

Yet, Class Counsel argue that:

> *Dunk* was not a common fund case....

(Class Plf's ABM at 34). *Dunk* was a class action. Its holding is directly relevant to the issue before this Court.

For a more complete discussion of *Dunk*, see Appellant's OBM at 14.

5. *Lealao.*

Lealao v. Beneficial California, Inc., 82 Cal.App.4th 19 [97 Cal.Rptr.2d 797] (1st App. Dist., Div. 2, July 10, 2000), is similar to *Serrano III* in that:

> The plaintiffs' counsel moved for reasonable attorney fees, resting not on statute but on the inherent equitable powers of the court. In support of their claim they relied on three theories: the common fund, substantial benefit, and private attorney general exceptions to the general rule disfavoring fees.

Lealao at 38 (footnote omitted; emphasis added).

Class Counsel point to the court's statement that:

> Despite its primacy, the lodestar method is not necessarily utilized in common fund cases.

(*Lealao* at 27.) This sentence is either meant to be an historical reference (and "was" would have been a better choice than "is") or refers to "under federal law" in the paragraph that follows:

> Under federal law, the amount of fees awarded in a common fund case may be determined under either the lodestar method or the percentage-of-the-benefit approach....

Lealao, supra, at 27 (citation omitted). Otherwise the sentence contradicts the whole thrust of *Lealao*, which is that the lodestar is the starting point of any calculation of a reasonable attorney's fee.

For a more complete discussion of *Lealao*, see Appellant's PR at 12, 13, 19 and 21, and Appellant's OBM at 15-16.

6. *Thayer.*

Thayer v. Wells Fargo Bank N.A., 92 Cal. App. 4th 819 [112 Cal.Rptr.2d 284] (1st App. Dist. Oct. 2, 2001), supports Appellant Brennan's argument on the lodestar as anchor.

> "[T]he primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method...."

Id. at 833 (citations omitted).

For a more complete discussion on *Thayer*, see Appellant's PR at 20.

7. *Consumer Privacy.*

Consumer Privacy Cases, 175 Cal.App.4th 545 [96 Cal.Rptr.3d 127] (1st App. Dist. June 30, 2009), supports Appellant Brennan's argument on the lodestar as an anchor.

> The trial court then used a lodestar analysis to determine the base fee, and applied a multiplier to calculate the final award. ""[T]he primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method....""

Id. at 556-57 (citations omitted) (emphasis added).

Class Counsel's argument:

> 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*,....

(Class Plf's ABM at 24, *citing Consumer Privacy Cases,* 175 Cal.App.4th at 558),

is a misunderstanding of the use of the term percentage method, which was actually a part of the court's multiplier analysis. The "method" being referenced in *Consumer Privacy* is referring to the calculation of an enhancement to the lodestar.

For a more complete discussion on *Consumer Privacy*, see Appellant's PR at 22 and 23.

8. *Chavez.*

Class Counsel's assertion that *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413] (1st App. Dist. Apr. 21, 2008), supports their interpretation of *Serrano III* is based on a misunderstanding of *Chavez.*

Class Counsel's reference to the statement in *Chavez*:

> It is not an abuse of discretion to choose one method over another as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace.

(*Chavez,* 162 Cal.App.4th at 65-66),

misunderstands *Chavez's* discussion. *Chavez* does not challenge *Serrano III's* primacy of the lodestar approach.

> To establish a benchmark for determining the enhanced lodestar amount, the court used the percentages that a hypothetical enhanced fee would represent of the sum of the fee plus the aggregate value of the benefits claimed by class members under the Original Agreement....

Chavez, 162 Cal.App.4th at 64-65.

Chavez does use the words "method" and "formula," but it is not referring to the methodology of the lodestar vs. the percentage approaches. The methodology being referred to in *Chavez* concerns how percentage-of-the-fund evidence may be used as an enhancement factor.

For a more complete discussion on *Chavez v. Netflix,* see Appellant's PR at 9 n.7, 24, 25, and 26.

9. *Consumer Cause.*

Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc., 127 Cal.App.4th 387 [25 Cal.Rptr.3d 514] (2d App. Dist. Mar. 7, 2005), does not support Class Counsel's argument.

Consumer Cause was not a case involving the actual calculation of a reasonable attorneys' fee. It concerned whether an objector who succeeds in defeating the approval of a proposed class action settlement is entitled to an attorneys' fee for his efforts. There was no discussion of *Serrano III.*

For a more thorough discussion on *Consumer Cause,* see Appellant's PR at 11, 26, 27.

10. *Wershba.*

Wershba v. Apple Computer, Inc., 91 Cal.App.4th 224 [110 Cal.Rptr.2d 145] (6th App. Dist. July 31, 2001), does not address the issue of the *Serrano III's* instruction on the primacy of the lodestar-multiplier approach. The *Wershba* decision involves a misreading of *Chavez*. What is more, *Wershba* relies on federal jurisprudence (namely *Zucker v. Occidental Petroleum Corp., et al.*, 968 F. Supp. 1396, 1400 (C.D. Cal. June 4, 1997), cited in *Wershba* at 254), not *Serrano III.*

For a more thorough discussion on *Wershba*, see Appellant's PR at 27 and 28.

11. Regarding Class Counsel's reference to the statement in *Ketchum v. Moses*, 24 Cal.4th 1122 [104 Cal.Rptr.2d 377] (Feb. 26, 2001):

> "*[W]e 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...."

> (Class Plf's ABM at 23 n.7, *citing Ketchum*, 24 Cal.4th at 1136),

it should be noted that the context of the statement is a "fee-shifting statute."[14]

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[14] For Class Counsel, whose constant refrain is that such and such case was "not a common fund case," it is surprising that they cite this statement, referring to a statutory fee-shifting case.

III.

THIS COURT SHOULD PRESERVE THE PRINCIPLES UPON WHICH ITS *SERRANO III* DECISION IS BASED

A. This Court's *Serrano III* Instructions Are Being Thwarted.

Appellant Brennan believes that the *Serrano III* instructions should be strengthened, not jettisoned in favor of federal fee jurisprudence as Class Counsel argue. Unfortunately, the question posed by this Court, even when answered in the negative, is not sufficient to ensure that the goals of *Serrano III* continue into the 21st century.

This Court had it right in 1977 regarding the need to anchor the fee awards to the lodestar approach. The legal principles on which *Serrano III* is based, "objectivity," "just compensation," "attorneys' services," "the prestige of the judiciary," and "the prestige of the bar," are sound values and should continue to be the focus of the fee award process. This case presents an historic occasion for this Court to make the policy choices expressed in *Serrano III* a reality in the context of modern class action litigation.

For Appellant Brennan, revisiting the issue would require this Court to confront the fact that over the 40 years that *Serrano III* has been in effect, plaintiffs' class counsel, with the acquiescence of defendants' counsel and the judiciary, have watered down *Serrano III's* instructions and have turned the requirement of "a careful compilation of the time spent and reasonable hourly compensation of each attorney...." (*Serrano III*, 20 Cal.3d at 48); the requirement that courts "carefully review attorney documentation of hours expended,"

and the requirement that "'padding' in the form of inefficient or duplicative efforts is not subject to compensation" (*Ketchum,* 24 Cal.4th at 1131-32), into a cursory exercise with percentage calculations as a hidden guiding principle. The trial and appellate court findings in *Laffitte, supra,* reflect this phenomenon:

Objection [by Class Member Brennan]: Class Counsel's declarations are unhelpful and self-serving.

> "The settlement that has been reached is the product of tremendous effort, and a great deal of expense by the parties and their counsel. The parties' assessment of the matter is based on one of the most heavily litigated cases I have ever been a part of and the extensive research and litigation for the past 8 ½ years. This litigation included extensive written discovery, extensive law and motion practice, 68 depositions, three Motions for Summary Judgment, a Class Certification Motion, subsequent Reconsideration Motion and then another Motion to Decertify, numerous experts, consultation with an economist regarding potential damage exposure and two full day mediations."

Laffitte, 231 Cal.App.4th at 867-68 (*quoting* Decl. of Kevin Barnes, see Appellant's Appendix ("AA") at 30:4-11).

The trial court's findings:

> Class Counsel has spent 4,263.5 attorney hours on the instant matter. (Barnes Decl... ¶ 14.) This is a fairly reasonable number of hours to have billed on a class action matter that was heavily litigated for 8.5 years....

(AA at 149; emphasis added.)

> Class Counsel billed $2,968,620 on this amount of time, based on hourly rates of $750/hour for Barnes and Antonelli, $600/hour for Lander and Carney, and $500/hour for Hilaire.... This rate is justified by the high level of Class Counsel's experience in litigating wage and hour claims/class actions.

(AA 149; AOB 27-28.)

The appellate court's findings:

> "We see no reason why [the trial court] could not accept the declarations of counsel attesting to the hours worked, particularly as [the court] was in the best position to verify those claims by reference to the various proceedings in the case."

Laffitte, 231 Cal.App.4th at 880 (brackets in original) (citation omitted).

> "[T]asks that were performed by class counsel and the number of hours that they spent on those tasks were reasonable...."
>
> ....
>
> "[R]easonable for this type of work in this community."

(Class Plf's ABM, at 6 and 7, respectively (RT 32, statement by trial court at 3/22/13 hr'g).)

The trial court's lodestar finding of a fungible 2.13 multiplier was accepted:

> The *Laffitte* Court also held that the trial court's "use of a multiplier of 2.13 was not an abuse of discretion,"

(Class Plf's ABM at 8, *citing Laffitte*, 231 Cal.App.4th at 881 [180 Cal.Rptr.3d at 151].)

The appellate court's finding on the multiplier:

> "[I]ncluding 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."

(Class Plf's ABM at 8, *citing Laffitte*, 231 Cal.App.4th at 881 [180 Cal.Rptr. at 151].)

The *Laffitte* court fell into the trap that *Yuki* warned against:

> [I]t is improper for the trial court to start with the amount of the contingency fee and then work backwards, applying the various other factors in order to justify that amount.

Yuki, 31 Cal.App.4th at 1771.

B. *Serrano III's* Choice of the Lodestar Is Still Sound.

Serrano III can be adapted to 21st century class action litigation while preserving the important guiding principles upon which its jurisprudence is based.

(1) Preserving the common fund doctrine and the concept of *quantum meruit* (see Appellant's PR at 11) as originally intended.

> It cautioned judges that attorneys' fee awards must be made "with moderation and a jealous regard to the rights of those who are interested in the fund.

Trustees v. Greenough, 105 U.S. 527, 536 (May 8, 1882) (emphasis added).

(2) Preserving the public's respect for the prestige of the judiciary.

(3) Preserving the public's interest in the integrity of the bar.

(4) Ensuring that attorneys' fees awarded by courts do not exceed the "just compensation" for the "attorneys' services" rendered to the client.

Class Counsel, in seeking to replace the lodestar with the percentage approach, would have the magnitude of the fee unrelated to the work performed on the case. Such a result is inconsistent with the concept of "just compensation," as well as the exercise of equitable discretion. Class Counsel's references to a marketplace fee (Class Plf's ABM at 24, 38, 39) is also inconsistent with the concept of "just compensation." In the first place, there is no working private marketplace with regard to class action litigation. If there were, it would not have been necessary for the judiciary to create the class action mechanism. Furthermore, the marketplace to which Class Counsel refer permits an attorney to collect a fee from a client, for which anything short of an unconscionable fee is an enforceable agreement.

Appellant Brennan understands the attraction of the percentage-of-the-recovery approach to both attorneys and judges. However, the shortcomings in the implementation of the lodestar approach in class actions are self-inflicted and are easily correctable. The lodestar deficiencies identified in the *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237 (1985) ("Task Force Report"), are easily rectifiable by the suggestions

contained in Appellant's Opening Brief on the Merits at Argument IV, commencing at page 45.

As has already been pointed out, the reforms suggested by Mr. Brennan add no additional burdens that attorneys and judges do not already assume in carrying out their duties and responsibilities in traditional litigation.

C. This Court Should Not Adopt the Fee Jurisprudence of the Federal Circuits.

Class Counsel would have this Court discard the fundamental principles of *Serrano III* and substitute a percentage-of-the-recovery approach because, among other things, percentages are easy to administer, conserve judicial resources, reduce judicial appellate workloads, and encourage attorneys to file class action lawsuits. (Class Plf's ABM at 3.)

Ease and convenience[15] should not take precedence over the legal rights of class members and the legal responsibilities of

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[15] Arguments in favor of this change are mainly focused on what benefits class action plaintiffs' lawyers and the judiciary will receive:
(a) less work for attorneys;
(b) less work for courts in general;
(c) less work for judges;
(d) and – left unsaid – less money for class members and more money for the attorneys:

> Common fund fees, however, can sometimes be calculated using a percentage-of-the-fund method, which can result in fees that the courts might be reluctant to grant under the lodestar-adjustment method.

Richard M. Pearl, *California Attorney Fee Awards,* 3d ed. (CEB Mar. 2014 Update), at § 5.18, p. 5-11 (emphasis added).

attorneys and judges. The public interest should be the predominant consideration.

> [H]eavily burdened with the class and derivative actions that give rise to the need to adjudicate fee issues, [judges] became disillusioned with the lodestar method.

Lealao, 82 Cal. App. 4th at 28.

Class Counsel, in their call to abandon *Serrano III* and the lodestar approach and adopt federal percentage-of-the-recovery jurisprudence, rely heavily on the Task Force Report and cases citing to it. (Class Plf's ABM at 10.) This Court should not make major policy decisions about future California class action attorneys' fee jurisprudence based on the Task Force Report for the following reasons.

The 1985 Task Force Report is 30 years old!

(a) In fact, a recent study of federal fee jurisprudence, *Is the Price Right? An Empirical Study of Fee Setting in Securities Class Actions*, by Lynn A. Baker, Michael A. Perino, and Charles Silver, 115 Colum. L. Rev. 1371 (October 2015), should be reviewed by this Court if it is inclined to consider Class Counsel's suggestion. This recent study portrays a very flawed federal attorneys' fee jurisprudence:

> Even more troubling are our findings regarding the role of the courts in the fee-setting process. We found no evidence that the actions taken by the courts move class counsel's fees closer to the "right price." Instead, the data showed that the courts facilitate, rather than prevent, the exploitation of market imperfections by class counsel, enabling them systematically to obtain

> higher fees from courts and judges that see securities class actions less frequently than from more experienced courts. And although judges do sometimes cut class counsel's fees, those decisions were unpredictable. That is, judicial fee cuts are as likely to result in fees that are further from the "right price" as they are to move them closer to that ideal.
>
> ....
>
> In sum, there is little to celebrate in the current state of affairs, and reason to think that even small improvements in the fee-setting process might yield significantly better results.

Id. at 1424.

California should lead in the reform of the class action attorneys' fee award process, not follow flawed federal jurisprudence.

(b) The Task Force Report is clearly a self-interested study. It focuses on the needs and concerns of plaintiffs' lawyers, judges, and the judicial system, and not the interests of class members and the general public. The method of fee calculation should not be overhauled to accommodate the needs of attorneys and judges.

(c) The Task Force Report lacks any input from persons[16] representing class members' interests in maximizing their recovery.

(d) What arguments are proffered as purported benefits to the class are attempts to rationalize the self-serving

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16 "The attorneys' fee at issue here does not directly concern the respondent/defendant Robert Half entities." Respondent Robert Half's Answer Brief on the Merits, "Brief of Respondents Robert Half Int'l Inc. and Affiliates," at 1.

interests, financial and otherwise, of the other participants in class action litigation. Most importantly, in common fund recoveries, the percentage approach does not align the interests of judges and attorneys with class members. (See page 30, *supra,* Pearl, note 15.)

(e) The assertion that a lodestar approach is "cumbersome, enervating, and often surrealistic process ... that now plagues the Bench and Bar" (Class Plf's ABM at 11, *citing Lealao* at 29), is without foundation. The lodestar approach is currently the system that all federal courts use in statutory fee-shifting cases. With the notable exception of contingent fee personal injury litigation, the practice of law primarily involves billings based on hours expended.

Indeed, the lodestar – the calculation of attorneys' fees by calculating the attorneys' hourly rate for necessary services provided – continues to be the predominant method by which attorneys are compensated in the legal marketplace.

(f) Appellant Brennan believes that this Court should not give any credence to arguments that *Serrano III* and the lodestar approach should be abandoned because it encourages abuses by lawyers and judges. The Task Force Report states:

> (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";

(Class Plf's ABM at 11, *citing Lealao, supra,* 82 Cal.App.4th at 29 (*quoting* Task Force Report at 246-49.)

Attorney responsibilities should be enforced, not ignored, through the implementation of the percentage approach. It is already a provision of the California Business and Professions Code, § 6068, that:

> It is the duty of an attorney to do all of the following:
> ....
> (g) Not to encourage ... the continuance of an action or proceeding from any corrupt motive of passion or interest.

Changing the compensation methodology because it motivates improper behavior on the part of attorneys is an affront to the professionalism of the bar.

(g) There is no marketplace compensation that regulates class action plaintiffs' attorneys' fees.

The private marketplace is irrelevant to the class action mechanism. The reason the class action mechanism exists is because there is no market for the prosecution of small claims by individuals.

The example cited by Class Counsel:

> "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."

(Class Plf's ABM, at 37, *citing In re King Resources Co. Sec. Litig.*, 420 F.Supp. 610, 631 (D. Colo. 1976)),

supports Appellant Brennan's position. The fee-for-service model in medicine has strong parallels to the lodestar method, not to a results-based methodology. A doctor is not permitted to charge for an operation based on a percentage of the wealth of the patient.

In asserting that the so-called lodestar cross-check used by the Superior Court is discretionary (Class Plf's ABM at 1), means that California courts may ignore entirely the work the lawyers did in the case and focus solely on the size of the class's recovery. This contradicts the basic principle of class action fee jurisprudence that has existed for nearly 40 years.

Any argument by Class Counsel that a so-called lodestar cross-check will rein in excessive fees does not square with the facts. The methodology used by the *Laffitte* court shows how any lodestar cross-check is easily manipulatable to accommodate a preconceived percentage calculation (see pages 26, 27, 28, *supra*). This point is addressed in the Baker, Perino & Silver study:

> Finally, this Article finds that so-called "lodestar cross-checks," which are supposed to help judges moderate fee awards, have unintended effects. All else equal, fee awards are significantly higher when fee requests include cross-checks than when lawyers use only the percentage method. A plausible explanation is that lawyers are anticipating judges' reactions to fee requests and acting strategically. They include lodestar information when their requests may appear excessive and they omit it either when they expect judges to grant their requests or they think that the lodestar data will not help their cause.

....

> This is likely true for all class actions, because the doctrines and procedures that govern fee awards are largely the same across different substantive areas of the law.

Baker, *et al.*, *Is the Price Right? supra*, at Highlight and 1423, respectively.

Stripped of the rationalizations of the Third Circuit Task Force Report, Class Counsel's replacement of the lodestar approach with the percentage approach permits windfall fees as part of a reasonable attorneys' fee analysis.

D. The 33-1/3% Contingency Fee Must Firmly Be Rejected by This Court.

This Court should also explicitly reject in its entirety class action attorneys' fee jurisprudence that arises out of the traditional individual client, single lawyer/law firm contingent fee model. The contingent fee model is inappropriate. The risks of individual tort litigation are inapposite. The class action mechanism accommodates the problem of risk. (See Appellant's PR at 12, 13.)

Although 33-1/3% has been engrafted as a contingency percentage from traditional single-plaintiff, single-attorney/law firm tort litigation, that model has nothing in common with common fund class action litigation. The paradigm of the percentage fee should not be the 33-1/3% that an individual who hires a lawyer pays in the retail legal marketplace. Class actions are different.

> Fee cutting in aggregate mass torts can usually be justified because the aggregation of claims lessens the

> force of the traditional justifications for contingency fees -- enabling access, providing legal services and rewarding risk.

In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283, 334 n.109 (3d Cir. July 23, 1998).

Even federal law, which Class Counsel point to, does not approve of 33-1/3% from a class action common fund. Class Counsel ignore the fact that the Task Force Report mentions a sliding scale percentage rather than the fixed fee of 33-1/3% proposed by Class Counsel.

> "In most instances, it will involve a sliding scale dependent upon the ultimate recovery, the expectation being that, absent unusual circumstances, the percentage will decrease as the size of the fund increases."

Lealao, supra, 82 Cal. App. 4th (at 29, n.4, *citing* Task Force Report at 255-56).

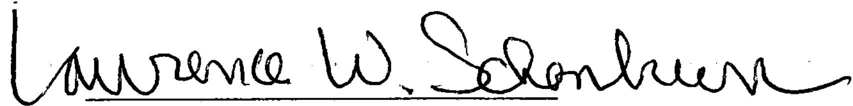
CONCLUSION

This Court should take the opportunity presented by *Laffitte* to ensure that the seminal instructions in *Serrano III* are adapted to the modern demands of 21st century litigation. At present, plaintiffs' class action lawyers dominate the process and are reaping an excessive share of their clients' recoveries. Class Counsel's suggestion to adopt federal fee jurisprudence will only make the

situation worse. Strengthening *Serrano III's* protections is the right answer for California's class action attorneys' fee jurisprudence.

Dated: November 12, 2015

Respectfully submitted,



Lawrence W. Schonbrun
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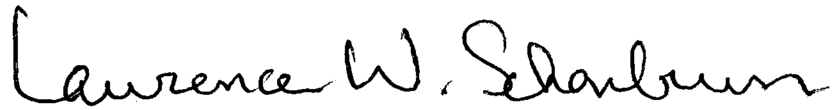
CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the attached Appellant's Reply Brief on the Merits contains 8,188 words of proportionally spaced Times New Roman 14-point type as recorded by the word count of the Microsoft Office 2007 word processing system, and is in compliance with the type-volume limitations permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: November 12, 2015



Lawrence W. Schonbrun
Attorney for Plaintiff Class Member/
Objector and Appellant David
Brennan

CERTIFICATE OF SERVICE

I declare that:

I am over the age of 18 years and not party to the within action. I am employed in the law firm of Lawrence W. Schonbrun, whose business address is 86 Eucalyptus Road, Berkeley, California 94705, County of Alameda.

On November 12, 2015, I caused to be served a copy of the following document:

APPELLANT'S REPLY BRIEF ON THE MERITS

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

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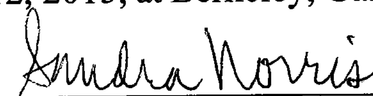
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 12, 2015, at Berkeley, California.



Sandra Norris