No. S233983

IN THE
SUPREME COURT OF CALIFORNIA

MIKE HERNANDEZ, et al,
Plaintiffs and Respondents,

FRANCESCA MULLER,
Plaintiff and Appellant.

v.

RESTORATION HARDWARE, INC.
Defendant and Respondent.

After a Decision by the Court of Appeal of the State of California
Fourth Appellate District, Division One
Case No. D067091

On Appeal from the Superior Court of the County of San Diego
The Honorable William S. Dato
Case No. 27-2008-00094395-CU-BT-CTL

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Petition should be denied because this case is an exception that should not be the basis of any new rule. The issue below was the appropriateness of attorney fees awarded ***after a trial on the merits in a class action.*** If civil trials are a rare breed, civil class action trials are an endangered species. In a recent study commissioned by the California Administrative Office of Courts, only 0.7% of the cases studied were disposed of through a trial verdict. Petitioner is asking the Court to establish a new rule, and overrule longstanding precedent based on an anomaly.

Moreover, the attorneys' fees awarded—25% of the trial court's judgment following trial—is well below California's 33% benchmark, and was eminently reasonable considering this case began eight years ago, and was doggedly pursued through interlocutory appeals and trial. There was no reason for the Court of Appeal to reverse the attorneys' fees award, and there is no reason for this Court to step in now.

If this Court is concerned about the rule set forth in *Eggert v. Pacific States Savs. & Loan Co.*, (1942) 20 Cal.2d 199 [124 P.2d 815] (hereafter *Eggert*), which requires an unnamed class member to intervene as a party to obtain appellate standing, the most it should do is depublish *Hernandez v. Restoration Hardware, Inc.* (2016) 245 Cal.App.4th 651 [199 Cal.Rptr.3d 719]. Because of the unique factual circumstances of *Hernandez*, which involved a decision on the merits rather than settlement, it is not well-suited to serve as new precedent. Any decision by this Court would mostly be applied to class action settlements, which are already subject to specific procedures for approval under the California Rules of Court. If this Court

affirms or overrules *Eggert*, it should do so in the context of a class action settlement, rather than a class action trial.

STATEMENT OF THE CASE

Respondent Michael Hernandez filed this case on October 21, 2008, alleging that Defendant violated the Song-Beverly Credit Card Act, California Civil Code section 1747.08, by requesting and recording ZIP codes from credit card consumers. Respondent Amanda Georgino joined as a plaintiff on May 23, 2012. On June 1, 2012, Judge William S. Dato of the San Diego County Superior Court certified the case as a class action, and appointed Respondents as Class representatives, and Patterson Law Group and Stonebarger Law as Class Counsel.

Class members received notice of the pending class action by direct mail and email in June 2013. The notice advised Class members that they had the option to either: 1) remain in the Class and be bound by any judgment; or 2) opt out of the Class and not be bound by any judgment.

In response to the notice, Mr. Lawrence Schonbrun entered an appearance in the action on behalf of Petitioner Francesca Muller. Petitioner never took any action to formally intervene in the case, or join as a class representative.

Judge Dato tried the case in January 2014. The trial court's Proposed Statement of Decision found that Defendant committed approximately 1,213,745 violations of Section 1747.08 during the class period, and awarded a penalty of $30 per violation.

At the trial court's direction, the parties stipulated to a claims process, which the court adopted in the final judgment. The claims process

adopted the trial court's finding that each class member is entitled to $30 per violation, but also expanded Class members' rights substantially:

- Defendant stipulated to a final judgment amount of $36,412,350 based on the ***maximum number*** of 1,213,745 violations at $30 per violation;
- Defendant waived any right to appeal the judgment;
- Class members had the option of submitting a claim form for $30 cash per violation as awarded by the court following trial;
- Known Class Members received a freely transferable coupon worth up to $3,333.33 in true savings, even if they did not submit a claim form for cash; and
- Defendant stipulated that the entire $36,412,350 final judgment must all be paid out through the claims for cash and actual redeemed coupons.[1]

Petitioner did not object to the Final Statement of Decision or the proposed claims process.

Class Counsel filed a motion for attorneys' fees in the amount of $9,103,087.50, or 25% of the $36,412,350 judgment amount. Defendant agreed not to oppose the request if it was limited to 25% of the judgment following trial (as opposed to 33%). At the trial court's request, Class Counsel supplemented the motion with a traditional lodestar calculation.

Class Counsel served a copy of its lodestar analysis on Petitioner. The lodestar analysis showed that Class Counsel expended over 3,542.6

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[1] Defendant filed an accounting with the trial court on April 5, 2016 confirming that it actually paid out $63,500,309.17—far more than what was required to satisfy the trial court's judgment.

hours and $2,681,062.92 in fees and costs up to that date, and provided detailed information regarding which attorneys worked on the case, the hours they spent on various tasks, and the reasonableness of their hourly rates.[2]

Petitioner did not file an objection or opposition to Respondents' motion for attorneys' fees. Instead, Petitioner filed a "Request for Clarification," asking the court to clarify whether Class members would receive notice of the fee application and a right to comment or appear at the hearing, and whether Class Counsel would be required to file lodestar information (which they did).

Petitioner appeared telephonically at the hearing on the motion for attorneys' fees. She conceded that she had no authority to support her request that the trial court order a second notice to Class members regarding the fee motion. She did not object to the amount of fees requested, and admitted that she could only "guess" as to whether Class Counsel submitted sufficient information for a lodestar analysis, even though she had received Class Counsel's lodestar analysis. After the hearing, Petitioner filed an Objection to the [Proposed] Final Judgment. The trial court did not rule on this objection.

The trial court awarded Class Counsel $9,103,087.50 in attorneys' fees, finding the amount "eminently reasonable" in light of the risks taken in prosecuting this action from its initiation, through an interlocutory appeals process, and finally, through trial.

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[2] The amount of hours spent on this case has increased substantially due to post-trial work administering the claims, and this appeal.

THE PETITION SHOULD BE DENIED BECAUSE THE CIRCUMSTANCES OF THIS CASE ARE THE EXCEPTION, NOT THE BASIS FOR A NEW RULE

This case is the exception, not the norm. Class action cases rarely proceed to trial in California. In a recent study commissioned by the California Administrative Office of the Courts, only 0.7% of 1,294 class action cases studied were disposed of by a trial verdict. (Judicial Council of Cal. AOC (March 2009) Findings of the Study of California Class Action Litigation, 2000-2006, p. 11 (hereafter Study of California Class Action Litigation), attached as Exhibit 1.)

The cases Petitioner cites to raise a conflict with *Eggert* involve class action ***settlements***. In a settlement, class counsel is negotiating a compromise of the class' substantive claims. A potential conflict of interest exists because class counsel could be tempted to compromise the class's claims to enhance or guarantee their attorney fees. California Rules of Court, rule 3.769 addresses this conflict by imposing strict requirements for approval of class action settlements.

The California study found that 31.9% of class actions are resolved by settlement. (Study of Class Action Litigation, *supra*, at p. 11.) If this Court is concerned with how *Hernandez* will apply to class action settlements, the simplest way to address this concern is to depublish it. It makes no sense to reconsider the rule set forth in *Eggert* in a case that is essentially a procedural anomaly.

THE PETITION SHOULD BE DENIED BECAUSE *EGGERT* IS GOOD LAW AND POLICY, PARTICULARLY WHERE CLASS CLAIMS ARE ADJUDICATED ON THE MERITS

When class claims are resolved on the merits, class members are not "parties" with rights to appeal. (*Eggert, supra*, 20 Cal.2d at p. 200.) In *Eggert*, the California Supreme Court dismissed the appeal of two class members who objected to an award of attorney fees because they were not "parties" to the record. (*Ibid.*) After entering judgment for the class in the amount of $1.85 million, the trial court in *Eggert* awarded attorney fees to class counsel as a percentage of the total recovery. (*Ibid.*) The class representative subsequently petitioned for an order to distribute the judgment to class members after deducting attorney fees. (*Ibid.*) At the hearing on that petition, two unnamed class members appeared through an attorney and objected to the attorney fees award. (*Ibid.*) The trial court granted plaintiff's petition, and the unnamed class members appealed on behalf of themselves and all other class members. (*Ibid.*) The class representative moved to dismiss the appeal. (*Ibid.*)

The California Supreme Court dismissed the appeal because "it is a settled rule of practice in this state that only a party to the record can appeal." (*Eggert, supra*, 20 Cal.2d at p. 201.) The *Eggert* court held that the unnamed class members failed to take appropriate steps to become parties to the record. (*Ibid.*) Merely appearing at the hearing on attorney fees was insufficient to confer standing. (*Ibid.*) Instead, appellants should have moved to vacate the judgment and then appealed from the order denying the motion to vacate. (*Ibid.*; see also *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736 [97 Cal.Rptr. 385, 488 P.2d 953] (hereafter *Carleson*) ["[O]ne who is legally 'aggrieved' by a judgment may become a party of record and obtain a right to appeal by moving to vacate the judgment . . .

."].) Because the *Eggert* class members did not do so, they were not parties to the record and lacked standing to appeal on behalf of themselves and the other class members. (*Eggert, supra*, 20 Cal.2d at p. 201.)

Eggert governs here, and the appellate court correctly held that it compelled dismissal. Petitioner did not take any steps to become a party to the record. Petitioner did not ask to be named a class representative, or demonstrate any willingness to take on the responsibilities and risks of a class representative. Nor did Petitioner move to vacate the final judgment. As Petitioner was advised in the class notice, by deciding to stay in the Class she was bound by the judgment.

Petitioner's appearance at the hearing on the motion for attorney fees does not confer appellate standing. California Rules of Court, rule 3.769 only allows class members the right to additional notice and an opportunity to object when a ***settlement*** affects "an entire class action, or . . . a cause of action in a class action." (Cal. Rules of Court, rule 3.769(a).) Petitioner conceded in her opening brief that "[t]he underlying litigation was resolved not by settlement, but through a court bench trial." The Class Representatives pursued this case through trial, and obtained a verdict awarding $30 in penalties per violation, which is exactly what Petitioner and the other class members received through the claims process. The Class's claims were resolved on the merits, not by settlement or compromise.

THE PETITION SHOULD BE DENIED BECAUSE PETITIONER WAS NOT AGGRIEVED BY THE TRIAL COURT'S ORDER AND THEREFORE, LACKS STANDING

Petitioner does not have standing because she was not aggrieved by the attorneys' fees award. (See Code Civ. Proc., § 902.) An "aggrieved"

party is one whose rights or interests are injuriously affected by the judgment. (*Carleson*, *supra*, 5 Cal.3d at p. 737.) An appellant's interest "must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." (*Ibid.*, quotation marks and citation omitted.) An appellant may not assert error that injuriously affected only non-appealing class members. (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1128 [269 Cal.Rptr. 844].)

Petitioner asserted two errors at the hearing on Plaintiffs' motion for attorneys' fees: (1) the court did not require a separate notice be sent to all Class members regarding Class Counsel's motion for fees; and (2) the court based its attorneys' fees award on the percentage of the fund method instead of the lodestar method. Petitioner was not aggrieved by either of these alleged errors.

Petitioner was not aggrieved by the first alleged error because she received notice and an opportunity to comment on Class Counsel's motion for attorneys' fees. Petitioner cannot claim lack of notice to other Class members as error. She is not a class representative, and does not have standing to assert an alleged error on behalf of other Class members that did not affect her. (See *Estrada v. RPS, Inc.* (2005) 125 Cal.App.4th 976, 985 [23 Cal.Rptr. 261] ["[C]lass members who are themselves aggrieved by trial court errors may, on appeal, assert those errors on behalf of the entire class – but the appellants must show they were, in fact harmed by the errors asserted."]; *Rebney*, *supra*, 220 Cal.App.3d at p. 1128.)

Petitioner was not aggrieved by the second alleged error because she never challenged the amount of attorneys' fees awarded. In fact, Petitioner admitted at the hearing on the motion for attorneys' fees that she had not

even reviewed Class Counsel's lodestar submission. Her objection to the attorneys' fees award is purely theoretical. By failing to make any argument that the trial court's use of the percentage of the fund method prejudiced her by awarding excessive attorneys' fees, Petitioner waived this argument. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 237 [110 Cal.Rptr.2d 145] ["[T]o the extent that the objectors raise an entirely new theory here, which was not considered by the court below, we will not entertain such an issue for the first time on appeal."].)

Petitioner is also not aggrieved because she does not have a property interest in the amount of attorneys' fees awarded by the trial court. She assumes, without authority, that any reduction in attorneys' fees awarded would revert to the Class. The trial court's statement of decision, however, did not award Class members a proportional share of the $36,412,350 judgment amount. Rather, it awarded Class members the option of claiming a $30 cash award per violation, or accepting a coupon worth savings of up to $3,333.33. All Class members received these benefits regardless of the amount of the attorneys' fees awarded. If the fee award were reduced, it would not revert to Class members, who have already been paid under the judgment. (See *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 559 [96 Cal.Rptr.3d 127] [rejecting objector's argument that class is entitled to the difference between the amount of attorney fees that defendant agreed not to object to, and the amount awarded by the court].) Petitioner has not suffered any property loss or harm from the attorneys' fees award. Therefore, she is not an "aggrieved" party under Code of Civil Procedure section 902.

Petitioner has argued that *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 [56 Cal.Rptr.2d 483], gives her standing. In *Dunk*, the court held that a class member had standing to object to attorney fees awarded ***pursuant to a settlement***, even though the class member did not have a property interest in the attorney fees. (*Id.* at p. 1808.) The *Dunk* court found that objectors to a class action settlement have standing to challenge an attorney fees award "because, if the agreement provided an incentive for one or more of the class attorneys not to litigate and thereby put his own interests ahead of the clients, then all class members were harmed." (*Ibid.*, quoting *Rebney, supra,* 220 Cal.App.3d at p. 1142.)

The *Dunk* exception to the general rule on standing does not apply when the class's claims are resolved by trial. Although Class Counsel and Defendant did agree to a cap on the amount of attorney fees requested, that agreement was made only after the trial court issued a decision on the merits. Class Counsel had no incentive to put its interests ahead of the Class. At that point, the Class's allocation of the judgment—a $30 penalty per violation—was set by the court, and not negotiated in a settlement by Class Counsel. Because there was no settlement or compromise of the Class's claims, the *Dunk* exception does not apply here.

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CONCLUSION

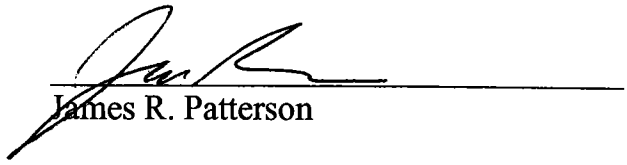
For the foregoing reasons, Plaintiffs and Respondents Michael Hernandez and Amanda Georgino respectfully request that this Court deny the Petition for Review.

Dated: May 11, 2016

Respectfully Submitted,

STONEBARGER LAW, APC

PATTERSON LAW GROUP, APC



James R. Patterson

Attorneys for Plaintiffs and Respondents Michael Hernandez and Amanda Georgino

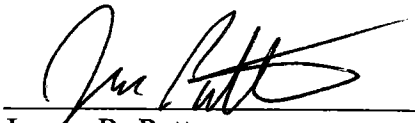
BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 8.204 OF THE CALIFORNIA RULES OF COURT

Under Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has typeface of 13 points or more, Time New Roman type, and contains 2,672 words, as counted by Microsoft Word 2007 word processing program used to generate the brief.

Dated: May 11, 2016

STONEBARGER LAW, APC

PATTERSON LAW GROUP, APC



James R. Patterson

Attorneys for Plaintiffs and Respondents Michael Hernandez and Amanda Georgino

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 402 W. Broadway, 29th Floor, San Diego, California 92101.

2. That on May 11, 2016, declarant served the **ANSWER TO PETITION FOR REVIEW** on the interested parties listed below by placing a true copy thereof in a sealed Federal Express envelope with postage thereon fully prepaid:

Supreme Court of California 350 McAllister Street San Francisco, CA 94102	Original + 13 Copies *Via E-Submission* *& Federal Express*
Court of Appeal Fourth Appellate District, Division One 750 B Street, Suite 300 San Diego, California 92101 ***Appellate Court***	1 Copy *Via Federal* *Express*
Clerk, San Diego Superior Court 220 West Broadway San Diego, Ca 92101 ***Trial Court***	1 Copy *Via Federal* *Express*
David F. McDowell DMcDowell@mofo.com Purvi G. Patel PPatel@mofo.com MORRISON & FOERSTER LLP 707 Wilshire Blvd., Suite 6000 Los Angeles, Ca 90017 Tel: (213) 892-5200 Fax: (213) 892-5454 ***Attorneys for Defendant/Respondent***	1 Copy *Via U.S. Mail*

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 11, 2016, at San Diego, California.

Tupu O'Neill

Tupu O'Neill

Judicial Council of California, Administrative Office of Courts (March 2009)
Findings of the Study of California Class Action Litigation, 2000-2006

EXHIBIT 1

[redacted]

Findings of the Study of California Class Action Litigation, 2000-2006

FIRST INTERIM REPORT
MARCH 2009

ADMINISTRATIVE OFFICE OF THE COURTS
OFFICE OF COURT RESEARCH

It is important to note at the outset that almost one third of the dispositions—consolidation, coordination, interlocutory appeal, stayed, and removal—are more properly characterized as "interim dispositions" rather than final dispositions. Because the case-file review did not allow for further data collection in these cases after they moved jurisdictions, the time to disposition in these cases is calculated at the point of the interim disposition. A useful follow-up will be to match these cases with the eventual lead or federal case and evaluate case life based on the final disposition. As noted in the introduction to this report, the OCR hopes to produce a fourth research report in this series that will follow cases that are transferred to federal court in collaboration with researchers at the Federal Judicial Center.

Frequency of dispositions

Disposition	*n*	Percent of Total Dispositions
Settlement	413	31.9%
Dismissed with prejudice	217	16.8%
Dismissed without prejudice	163	12.6%
Coordinated	141	10.9%
Removed to federal court	121	9.4%
Consolidated with another case	120	9.3%
Summary judgment for defendant	50	3.9%
Transferred	40	3.1%
Other disposition[22]	12	0.9%
Trial verdict	9	0.7%
Stayed	6	0.5%
Interlocutory appeal	2	0.2%
All Disposed Cases	1,294	100.0%

Table 1. Frequency of dispositions for all disposed class action cases in sample

Settlements were the most common type of disposition in study cases, representing 31.9% of all dispositions.[23] This was followed by dismissals with prejudice[24] and dismissals without prejudice. Because of their overall frequency, business torts and employment represent the majority of case types in all dispositions, except coordination. Of antitrust cases, 33 of 75 (or 44%) were coordinated, which is a higher percentage of coordination than in any other case type.

[22] "Other disposition" includes cases that were sent to mediation or arbitration, for example.
[23] The percentage of settlement dispositions skyrockets to 89.2% if the analysis is confined to cases with a certified class (258 out of 289 total certified cases with a disposition) with 88.4% of these certified as part of the settlement itself (n=228).
[24] "Dismissed with prejudice" does not include cases that settle and dismiss after finalization of the settlement agreement. These were coded as settlements during the case file review.