**IN THE SUPREME COURT OF CALIFORNIA**

**CASE NO. S178320**

IN RE COORDINATED PROCEEDING
SPECIAL TITLE (RULE 3.550(B))

In re BAYCOL CASES I and II

DOUGLAS SHAW, on behalf of himself and all others similarly situated,

*Plaintiff and Appellant,*

*v.*

BAYER CORPORATION,

*Defendant and Respondent.*



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After a Decision by the Court of Appeal, Second Appellate District,
Division Seven, Case No. B204943
Appeal from the Superior Court of the State of California for the County of
Los Angeles, The Honorable Wendell R. Mortimer, Judge,
Case No. JCCP 4217

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# OPENING BRIEF ON THE MERITS

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## ISSUE PRESENTED FOR REVIEW

Did the Court of Appeal erroneously hold that the grant of a demurrer without leave to amend to a complaint that contains individual as well as putative class allegations creates two separate deadlines to file a notice of appeal, notwithstanding the one final judgment rule?

## STATEMENT OF THE CASE

The "one final judgment rule" is a longstanding component of Anglo-American jurisprudence and provides that the deadline for filing a notice of appeal runs not on the date of a minute order, but rather commences on the date of entry of a final judgment. The bright-line one final judgment rule provides clear and easily determined notice, avoids unnecessary and duplicative appeals, and allows trial courts to exercise pre-appellate jurisdiction over important prejudgment motions.

The Court of Appeal below erroneously departed from the one final judgment rule and this Court's precedent when it held that the grant of a demurrer without leave to amend to a complaint that contains putative (uncertified) class allegations creates two separate appellate deadlines, with the appeal of class claims due sixty days from the date of the minute order and the appeal of the other claims due after entry of final judgment. However, pursuant to the one final judgment rule and longstanding precedent, the grant of a demurrer to a complaint creates but one appeal, and the deadline for that appeal commences not on the date of the minute order, but on the date of final judgment. The Court of Appeal's holding to

the contrary is erroneous and its dismissal of the appeal as untimely should be reversed.

## STATEMENT OF FACTS

Baycol was introduced to the U.S. market in 1998 and is respondent Bayer's brand name for a drug generically known as cerivastatin sodium, a type of cholesterol-lowering drug in a category commonly referred to as statins. (Appellant's Appendix ("AA") at 53 (FAC ¶¶ 2, 7).) A wide variety of statins are distributed in the United States, including atorvastatin (Lipitor), rosuvastatin (Crestor), prevastatin (Prevachol), simvastatin (Zocor), lovastatin (Mevacor), and fluvastatin (Lescol). Statins accounted for $9.5 billion in revenue in 2000, and sales for 2001 were estimated to exceed $14 billion based on 70 million prescriptions. (AA at 53 (FAC¶7).)

Bayer aggressively promoted Baycol as a safe and effective alternative to the other (more prevalent) statins on the market. (AA at 54 (FAC ¶ 8).) Early clinical trials, however, demonstrated that Baycol did not offer superior efficacy and safety relative to other statins, and indeed presented substantially greater risks. (AA at 54, 55-56 (FAC¶¶ 9, 15-19).) Specifically, Bayer knew as early as 1994 that Baycol lowered the liver s ability to produce coenzyme Q10 ( CoQ10"), an essential requirement for the body to produce energy, the absence of which causes serious side effects, including rhabdomyolysis and congestive heart failure. (AA at 55 (FAC ¶¶ 15-16).) Indeed, the frequency of rhabdomyolysis (and resulting renal failure) with Baycol was sixteen to eighty times higher than with other statins.[1] During the development of Baycol, SmithKline Beecham –

[1] *See, e.g.*, Zeitlinger M, Müller M (2003). "[Clinico-pharmacologic explanation models of cerivastatin-associated rhabdomyolysis]" (in German) *Wien Med Wochenschr* 153 (11-12): 250–4.

Bayer's marketing partner – expressed [s]erious concerns regarding the emerging profile of [Baycol], stating that [s]imple and safe no longer appears to be a viable promotional platform. (AA at 55-56 (FAC¶ 17) (emphasis in original).) Bayer nonetheless did not alter its planned marketing scheme for this drug.

Once on the market, the FDA also cautioned Bayer from making efficacy claims for Baycol relative to other statins because its evaluation showed Baycol was only minimally effective in lowering serum cholesterol levels compared to other statins already on the market. (AA at 56 (FAC¶ 18).) Bayer nonetheless aggressively marketed the purported relative safety and efficacy of Baycol through pervasive samples, detail visits to doctor offices (425,000 in 1998 alone), journal advertising and direct to consumer advertising. (AA at 54 (FAC ¶10).) Promotional spending for Baycol was $75 million in 2000, and resulted in sales of $586 million in 2000 and projected sales of $875 million in 2001. (AA at 54 (FAC¶10).) In 2001, Baycol was withdrawn from the market as a dangerous drug. (AA at 54 (FAC¶ 10).)

Bayer s marketing materials deliberately created the impression of extensive successful testing of Baycol while concealing vital information obtained in clinical tests. (AA at 56 (FAC¶21).) For example, in 1998, in addition to what Bayer already knew from clinical trials, Bayer became aware of many reported deaths associated with Baycol, but refused to adjust its advertising and marketing materials, which continued to insist that Baycol was safe and effective. (AA at 56 (FAC¶20).) During that same year, Bayer promoted Baycol by stating in the Physician's Desk Reference that [r]are cases of rhabdomyolysis with acute renal failure . . . have been reported with other [similar drugs] ((AA at 56 (FAC¶21) (emphasis

added)), a warning that was misleading because Bayer's own study showed that the occurrence of rhabdomyolysis resulting from Baycol was hardly rare and occurred in more than seven percent of patients taking Baycol. (AA at 56 (FAC ¶ 21).)

Bayer continued to learn additional material adverse information about Baycol in 1999 that it deliberately did not disclose. (AA at 58 (FAC, ¶ 26).) For example, in April 1999, Bayer learned that there were four to nearly forty times as many reported incidents of rhabdomyolysis among Baycol users as compared to each of the other six major statins on the market. (AA at 57 (FAC¶ 24).) Undeterred, and despite the FDA s express warning about comparative efficacy and safety claims, Bayer continued to take out multi-page advertisements touting these purported qualities as compared to Baycol's competition. (AA at 58 (FAC¶ 27).) The FDA again cautioned Bayer that promotional material for Baycol (cerivastatin sodium) [was] false, lacking in fair balance, and otherwise misleading, and directed Bayer to immediately cease its deceptive advertising, but Bayer continued to promote Baycol and downplay the risks associated with the drug. (AA at 58-59 (FAC¶¶ 29-32).)

In 2001, Bayer withdrew Baycol from the market for safety reasons. Bayer's pervasive misrepresentations about Baycol deceived both doctors and consumers about the serious potential adverse reactions linked to the use of Baycol. (AA at 54, 55, 59 (FAC¶¶ 9, 13, 32).). By representing that Baycol was a safe and effective replacement for other statins, Bayer deliberately marketed Baycol in an unlawful manner that concealed and misrepresented material facts concerning its safety and efficacy. (AA at 54-59.)

## PROCEDURAL HISTORY

On September 5, 2001, plaintiff, on behalf of himself and all others similarly situated, filed the present action against Bayer, which contained causes of action under California's Unfair Competition Law as well as for unjust enrichment. (AA at 140-59.) Bayer subsequently removed the case to federal court, and in 2002, the present action was transferred to a federal district court in Minnesota in connection with existing multidistrict litigation ("MDL") proceedings against Bayer.

Plaintiff moved for a remand to state court in 2001, a motion that was stayed pending the transfer, and again in 2004, at which point the motion was granted and the case remanded to California state court for lack of federal subject matter jurisdiction. (AA at 44-51 & 161-80.) In 2005, the present action was coordinated with *In re Baycol Cases I and II,* JCCP Nos. 4217 and 4223, pending in the Superior Court of California, County of Los Angeles, and the class claims alleged in the present action were stayed pending resolution of the many individual personal injury claims then pending in that forum.

On January 29, 2007, plaintiff filed a First Amended Complaint ("FAC") that added a claim for violations of California's Consumer Legal Remedies Act. (AA at 52-67.) As a result of the amendment, on March 19, 2007, Bayer filed a demurrer to the entire FAC. (AA at 68-97.) On April 27, 2007, the trial court issued an unsigned minute order that sustained the demurrer in its entirety, without leave to amend. (AA at 353-55.) The trial court's minute order asserted that the putative class allegations were barred by collateral estoppel and the alleged predominance of individual issues and that the individual claims were barred by various alleged deficiencies. (AA at 353-55.)

The trial court's grant of the demurrer without leave to amend on April 27, 2009, did not, for various reasons, promptly result in the entry of a final judgment.[2] Final judgment was instead entered on October 24, 2007 (AA at 533), and its notice of entry was served on October 29, 2007. (AA at 534-37.) Within 60 days of this final judgment, on December 20, 2007, plaintiff filed his notice of appeal.

On October 20, 2009, the Court of Appeal (1) reversed the trial court's dismissal of the individual claims, but (2) affirmed the dismissal of the class claims on the sole ground that the appeal as to those claims was untimely. (App. Opinion at 8-11.) Rather than consider the merits of the class claims, the Court of Appeal held that the time to appeal the dismissal of those claims commenced on April 26, 2007 – the date of the unsigned minute order sustaining the demurrer to the FAC – even though the time to appeal the individual claims did not begin to run until the trial court entered final judgment on October 24, 2007. (*Id.* at 8-11.) Thus, while the Court of Appeal reversed the trial court's dismissal of the individual UCL claims,–it dismissed the appeal of the virtually identical class claims as untimely.[3] (*Id.* at 10-11.)

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[2] On May 14, 2007, plaintiff filed a motion for reconsideration from the minute order sustaining the demurrer, but the trial court was unaware of this pending motion, and entered judgment on May 25, 2007. (AA at 383.) On June 5, 2007, the trial court issued a minute order that stated that it was unaware of the motion for reconsideration when it erroneously entered judgment, but that due to this entry of judgment, it had no jurisdiction to rule on the motion for reconsideration. (AA at 384-85.) On June 7, 2007, plaintiff moved to set aside and vacate the judgment, and the trial court did so on August 3, 2007. (AA at 386-400 & 466.) On September 21, 2007, the trial court denied plaintiff's motion for reconsideration on the merits. (AA at 52.).

[3] The sole issue on review is whether the Court of Appeal erroneously dismissed the appeal of the class claims as untimely.

Plaintiff timely filed a petition for review of the Court of Appeal's unpublished decision on November 20, 2009. Over Bayer's opposition, this Court granted plaintiff's Petition for Review on February 18, 2010.

## SUMMARY OF ARGUMENT

Pursuant to the longstanding "one final judgment" rule, this Court has repeatedly held that a grant of a demurrer does not start the period for filing a notice of appeal, and that the relevant date is instead that of the subsequent entry of final judgment. *See, e.g. Lavine v. Jessup* (1957) 48 Cal.2d 611, 614 ("An order sustaining a demurrer without leave to amend is nonappealable, and the appeal must be taken from the ensuing judgment. . . . [T]he time for appeal d[oes] not commence to run until the entry of judgment.") (citations omitted).

The Court of Appeal below, however, held that this longstanding rule is inapplicable to a complaint that contains putative class allegations, and on that basis dismissed as untimely the core of plaintiff's appeal. The Court of Appeal held that where, as here, a trial court sustains a demurrer to a complaint that contains individual as well as class allegations, this single order creates two different deadlines for filing an appeal: (1) one deadline to appeal the dismissal of the class claims, which commences upon entry of the order, and (2) a separate deadline to appeal dismissal of the individual claims, which begins to run upon entry of judgment.

The Court of Appeal's dismissal of the appeal, and its rejection of this Court's longstanding precedent, is not only erroneous, but profoundly pernicious. The Court of Appeal's holding requires the filing of multiple, duplicative appeals from a single order granting a demurrer. This holding

not only creates wasteful and duplicative filings in the Court of Appeal, but also prevents efficacious resolution in trial courts by requiring prejudgment appeals that divest the trial court of jurisdiction to entertain beneficial and *sua sponte* motions. The Court of Appeal's decision also conflicts not only with this Court's precedents, but also its repeated and express admonition that the one final judgment rule is to be strictly and consistently applied.

Finally, the Court of Appeal's holding not only causes substantial practical as well as doctrinal harm, but does so needlessly. The Court of Appeal contended that it was vital to commence the appeal deadline from the date of the unsigned minute order because doing so would create "a bright-line rule." App. Opinion at 9. But a bright-line rule already exists: the one final judgment rule. When a trial court grants a demurrer to a complaint, the time to appeal runs from the date of entry of judgment, not the order. This is not only a bright-line — indeed, luminous — rule, but is a far superior one to that established by the Court of Appeal.

This Court should accordingly reverse the decision of the Court of Appeal and reaffirm that the grant of a demurrer to a complaint creates but a single appeal, the deadline for which commences on the date of the entry of the one final judgment.

## ARGUMENT

### A. The One Final Judgment Rule.

This Court has repeatedly and consistently described the one final judgment rule as "a fundamental principle of appellate practice." *Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 697; *see also Walker v. Los Angeles County Metro. Trans. Auth.* (2005) 35 Cal.4th 15, 21 ("[T]he 'one final judgment' rule [is] a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case.").

Pursuant to this longstanding doctrine, an order that dismisses a complaint gives rise to a single appeal; further, the deadline to file this appeal commences on entry of the judgment, not on the date of the order. *Lavine v. Jessup* (1957) 48 Cal.2d 611, 614. The Legislature expressly reaffirmed this common law principle in *Cal. Code Civ. Proc.* § 904.1, "which essentially codifies the 'one final judgment rule' and provides that only final judgments are appealable." *H.D. Arnaiz v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1365-66.

This Court has repeatedly emphasized the importance of the one final judgment rule and the substantial deleterious consequences that result from departures from this principle. As this Court explained in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725:

> There are sound reasons for the one final judgment rule . . . . [T]hese include the obvious fact that piecemeal disposition and multiple appeals tend to be oppressive and costly. Interlocutory appeals burden the courts and impede the judicial process in a number of ways: (1) They tend to clog

> the appellate courts with a multiplicity of appeals. (2) Early resort to the appellate courts tends to produce uncertainty and delay in the trial court. (3) Until a final judgment is rendered the trial court may completely obviate an appeal by altering the rulings from which an appeal would otherwise have been taken. (4) Later actions by the trial court may provide a more complete record which dispels the appearance of error or establishes that it was harmless. (5) Having the benefit of a complete adjudication will assist the reviewing court to remedy error (if any) by giving specific directions rather than remanding for another round of open-ended proceedings.

*Id.* at 741 n.9 (citations omitted).

For these and other policy reasons, this Court has consistently held that even when a minute order – *e.g.*, the grant of a demurrer – dismisses the entirety of a complaint, effectively leaving nothing to be done in the trial court, the time to appeal nonetheless does not begin to run until the subsequent entry of a final judgment. *Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 651; *Lavine,* 48 Cal.2d at 614; *Berri v. Superior Court* (1955) 43 Cal.2d 856, 860.

**B. <u>The "Death Knell" Doctrine.</u>**

There is a limited caveat to the one final judgment rule that follows from this Court's holding in *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, that permits a plaintiff to appeal the dismissal of class claims when his individual claims have not been dismissed and thus remain to be litigated in the trial court. *Id.* at 699. *Daar* held that such orders effectively operate as

the "death knell" for the litigation because the core of the case — the class claims — has been dismissed but, due to the pending individual claims, no appeal yet lies. *Id.* Such orders, *Daar* held, "virtually demolish[]" the lawsuit, as the one final judgment rule would ordinarily compel the plaintiff to litigate his (largely valueless) individual claims to final judgment before he could file an appeal, thereby resulting in proceedings that would be not only inefficient and unnecessary, but also practically infeasible. *Id.*

For this reason, *Daar* held that when class claims are dismissed but individual claims remain, the resulting divergent treatment of the individual and class claims create the "legal effect" of an immediately appealable dismissal. *Id.* This Court reasoned that when individual claims remain but class claims have been dismissed, the resulting practical realities meant that '[i]f the propriety of such disposition could not now be reviewed, it could never be reviewed." *Id.* On this basis, *Daar* held that when a demurrer is sustained "to all members of the class *other than plaintiff,*" the pendency of the individual claims does not deprive the appellate court of jurisdiction, and an appeal is permitted. *Id.* (emphasis added).

Courts have repeatedly recognized that the "death knell" principle articulated in *Daar* necessarily relies upon the fact that individual claims persist that would ordinarily (and impractically) preclude appellate review. When there is a divergence between the treatment of the individual claims and the class claims, the "death knell" doctrine authorizes an appeal given the realities of modern litigation, and refuses to allow pending individual claims to preclude appellate review.[4]

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[4] The holding in *Daar* has not been without critique, and many jurisdictions, as well as the federal courts, ultimately rejected its approach, requiring plaintiffs to litigate pending individual claims to their conclusion before appealing the denial of proceedings on behalf of a class. *See, e.g., Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 465; *Garza v. Swift*

The fact that individual claims persist is the central ingredient of the holding in *Daar*. Because the individual and class claims have been treated differently, "the death knell doctrine fits comfortably into the exception to the one final judgment rule that arises when parties have separate and distinct interests; when this is true, there can be a final and appealable judgment for each such party. *Farwell v. Sunset Mesa Property Owners Ass'n* (2008) 163 Cal.App.4th 1545, 1547.

Accordingly, under *Daar's* "death knell" doctrine, a plaintiff may immediately appeal the dismissal of class claims even though individual claims remain to be litigated below.

## C. The Court of Appeal's Holding Is Inconsistent With Precedent.

The Court of Appeal held that even though plaintiff filed his appeal within sixty days of the entry of judgment, his appeal of the class claims was untimely because the deadline to appeal a trial court's order sustaining a demurrer to a complaint that contains class claims commences on the date of the order, rather than on the date of the final judgment. (App. Opinion at 8-9.) This holding conflicts with several holdings of this Court.

First, the Court of Appeal's ruling conflicts with the legion of cases in which this Court has expressly applied the one final judgment rule and held that the time to appeal the grant of a demurrer runs not from the date

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*Transp. Co., Inc.* (2009) 222 Ariz. 281; *Palmer v. Friendly Ice Cream Corp.* (2008) 285 Conn. 462; *Levy v. Metro. Sanitary Dist.* (1982) 92 Ill.2d 80, 82-84. To the extent immediate appeals are permitted, it now largely is by the legislative grant of authority. *See, e.g.*, Fed. R. Civ. Proc. 23(f); *Butler v. Audio/Video Affiliates Inc.* (1992) 611 So.2d 330 (allowing death knell appeals), later codified in Ala. Code § 6-5-642 (1999).

of the order, but rather from the date on which judgment is entered. This has been the law in California since its founding, and this Court expressly declared as early as 1870 that "it is only from the judgment, and not from the order sustaining a demurrer, that the plaintiff could appeal. We have repeatedly held that an order sustaining or overruling a demurrer is not an appealable order." *Agard v. Valencia* (1870) 39 Cal. 292, 297.

This Court reiterated throughout the nineteenth century that the one final judgment rule was categorically applicable to the grant of a demurrer. As this Court repeated in 1880: "From an order sustaining a demurrer no appeal can be taken directly to this Court; the only method of review of such proceedings here is through an appeal from the final judgment thereafter entered in the action itself, if such judgment be unfavorable." *Ashley v. Olmstead* (1880) 54 Cal. 616, 618.

This Court expressly reiterated this rule yet again in 1917, at which time it declared: "The only appeal that can be considered is that from the judgment, since our law does not authorize an appeal from an order overruling or sustaining a demurrer." *Harmon v. De Turk* (1917) 176 Cal. 758, 761. This rule was consistently applied in the latter half of the century as well; for example, this Court declared in *Berri v. Superior Court* (1955) 43 Cal.2d 856 that "an order sustaining a demurrer without leave to amend is not appealable as it is not the final judgment in the case. . . . It is only by the entry of judgment that plaintiff is in a position to test the correctness of the court's ruling since there is no appeal from a ruling on a demurrer but only from the ensuing judgment." *Id.* at 860.

This Court's recognition that the grant of a demurrer is neither an appealable order nor starts the deadline for filing such an appeal has been unvarying. As this Court yet again reaffirmed in 1957: "An order

sustaining a demurrer without leave to amend is nonappealable, and the appeal must be taken from the ensuing judgment. . . . [T]he time for appeal d[oes] not commence to run until the entry of judgment." *Lavine,* 48 Cal. at 614.

This Court has not only repeatedly articulated this principle, but has been vigilant in its enforcement as well. Relatively recently, for example, even after granting review, this Court held that it was compelled to dismiss an appeal because although a demurrer had been sustained without leave to amend, no judgment had yet been entered and hence "the appeal in *Zable v. Board of Supervisors* must be dismissed" because "[n]o appeal lies from an order sustaining a demurrer without leave to amend." *Youngblood* 22, Cal.3d at 651.

Simply put, it is beyond dispute that this Court has expressly and repeatedly held when a demurrer is sustained to a complaint, the time to appeal runs *solely* from the date of entry of a final judgment. This Court has consistently so held, in a span of holdings from as early as *Agard* in 1870 to this Court's holding in *Youngblood* over a century thereafter. In *every* case in which this Court has addressed the grant of a demurrer to a complaint, this Court has uniformly held that it is the date of judgment rather than the date of the minute order that determines the timeliness of the appeal.

This Court has never overruled its express and repeated holdings in *Agard, Ashley, Harmon, Berri, Lavine* or *Youngblood*, either *sub silentio* or otherwise. Plaintiff relied upon these consistent holdings and, on that basis, filed its appeal within sixty days of the entry of judgment. The Court of Appeal's dismissal of this appeal as untimely is contrary to this Court's precedent and should be reversed.

Moreover, not only is the Court of Appeal's holding inconsistent with over a century of this Court's jurisprudence, but also conflicts with the "death knell" doctrine established in *Daar*. This Court articulated the "death knell" doctrine in order to permit plaintiffs to appeal immediately the dismissal of class claims because the persistence of individual claims remained did not detract from the reality that that lawsuit was effectively over even though a judgment on the individual claims might be years away. *Daar,* 67 Cal.2d at 699, 699. When the class claims are dismissed but individual claims persist, the individuals and the class "have separate and distinct interests" (*Farwell*, 163 Cal.App.4th at 1547), as the class members want appellate review that would ordinarily be precluded by the pendency of the individual claims.

In such cases, in which there is *divergence* in the treatment of the individual and class claims — *i.e.*, when a demurrer is sustained "to all members of the class *other than plaintiff*" (*Daar*, 67 Cal.2d at 699) — *Daar* permits an immediate appeal of the class claims, a holding that reflects the practical effect of this divergent treatment. Because the individual claims persist, at best the class would be forced to endure undue delay awaiting the resolution of the individual claims. Moreover, realistically, the potential for the dismissed class claims to evade review altogether is high, as a plaintiff with only individual claims remaining often has little incentive to continue with the litigation to such a point where final judgment is entered on the individual claims. *Farwell*, 163 Cal.App.4th at 1552 ("[T]he gist of the death knell doctrine is that the denial of class action certification is the death knell of the action itself, i.e., that without a class, there will not be an action or actions, as is true of cases when the individual plaintiff's recovery is too small to justify pursuing the action."). The purpose of the death knell

doctrine is thus to ensure appellate review of important legal issues and to prevent unnecessary delay of the resolution of class claims solely because needless and inefficient individual claims remain to be resolved. As this Court stated in *Daar*, as a practical matter, "[i]f the propriety of such disposition could not now be reviewed, it could never be reviewed." *Daar*, 67 Cal.2d at 699.

By contrast, when — as in the present case — a demurrer has been granted to an *entire* complaint, this principle does not apply. In such cases, the individual claims do not remain to be litigated, and the *whole* complaint will be dismissed upon entry of final judgment. In such a setting, neither the individual nor the class members are compelled to engage in lengthy, meaningless litigation about nominal remaining claims in order to appeal; rather, they need simply await the entry of judgment. Nor in such cases do the interests or position of individual and class members diverge; instead, when a demurrer is granted to an *entire* complaint, these parties are situated identically.

The Court of Appeal's holding is thus inconsistent even with *Daar*, which permitted an appeal solely to avoid the injustice, inefficiency, and avoidance of review that would otherwise exist in representative actions in which individual claims *persist*. The application of *Daar* to those cases in which the individual claims are *dismissed* both misreads *Daar* as well as a century-plus of jurisprudence from this Court.

Both pre- and post-*Daar* holdings from this Court uniformly hold that the time to file an appeal from the grant of a demurrer without leave to amend runs from the date of entry of judgment. That class members may permissibly appeal when individual claims persist in no way overrules this consistently-applied holding; rather, properly interpreted, "the death knell

doctrine fits comfortably into the exception to the one final judgment rule that arises when parties have separate and distinct interests; when this is true, there can be a final and appealable judgment for each such party. *Farwell,* 163 Cal.App.4th at 1547.

When, as here, the entirety of a complaint is dismissed pursuant to a demurrer, and no individual claims remain, the clear holdings of this Court dictate that the time to appeal runs from the subsequent entry of judgment. The Court of Appeal's holding to the contrary is both unprecedented and unfair, particularly as applied to parties that have relied on this Court's consistent and categorical statements that "[n]o appeal lies from an order sustaining a demurrer without leave to amend." *Youngblood,* 22 Cal.3d at 651.

This Court should accordingly reaffirm *Agard, Ashley, Berri, Daar, Harmon, Lavine* and *Youngblood* and reverse the Court of Appeal.

## D. The Court of Appeal's Holding Is Pernicious.

The Court of Appeal's holding is as unwise as a matter of policy as it is unprecedented. Even were this Court writing without the backdrop of a century of consistent precedent, it should reject as unsound and unwise the Court of Appeal's creation of a two distinct appellate deadlines resulting from the grant of a single demurrer.

The bright-line rule established by the one final judgment rule and repeatedly applied by this Court is far superior as a policy matter to the principle advanced by the Court of Appeal below. The Court of Appeal's holding engenders not only all of the deleterious consequences identified by this Court in *Morehart v. County of Santa Barbara*, but creates substantial

additional pernicious effects as well. The Court of Appeal's holding is pernicious — and should be rejected — for a multitude of reasons.

### 1. Duplicative and Unnecessary Appeals.

First, the Court of Appeal's holding would engender multiple, duplicative appeals, and be both inefficient and unnecessarily wasteful.

A central function of the one final judgment rule is the avoidance of multiple and/or unnecessary appeals. *Griset,* 25 Cal.4th at 697. The one final judgment rule ensures that there is a *single* appeal, one that includes within its ambit each of the many related orders resulting from the action. By contrast, permitting — or, as the Court of Appeal did here, compelling — appeals prior to the entry of a final judgment allows multiple, often overlapping, appeals to be generated by a single lawsuit.

It is an "obvious fact that piecemeal disposition and multiple appeals tend to be oppressive and costly," *Morehart,* 7 Cal.4th at 741 n.9, and serve to burden not only the parties, but the judiciary as well. *Griset*, 25 Cal.4th at 697. Under the Court of Appeal's holding, the granting of a demurrer in a putative class action requires the filing and resolution of two separate appeals, one of which must be filed within sixty days of the minute order and the other after entry of a final judgment. This is the case even though these appeals both arise from a *single* order, and even though these appeals overlap both factually and legally, especially when (as here) the demurrer is granted to the individual and class claims on nearly identical grounds.

The Court of Appeal's holding breaks a plaintiff's action into pieces and promises a multiplicity of appeals in every class action in which individual and putative class claims are subject to a demurrer. This "would

defeat the purpose of the one final judgment rule by permitting the very piecemeal dispositions and multiple appeals the rule is designed to prevent." *Griset*, 25 Cal.4th at 697.

Moreover, permitting a single order to result in multiple appellate deadlines is precisely the type of "absurd situation" this Court critiqued in *Lavine* as untenable. *See Lavine*, 48 Cal.2d at 615 (rejecting the absurd situation [that] would result if we were to hold that the portion of the ruling sustaining the demurrers is non-appealable . . . but that the portion of the ruling granting the motions [to strike] is final and immediately appealable. ).

When, as here, a single minute order dismisses the entirety of a complaint pursuant to a demurrer, the fact that some of the allegations in that complaint assert putative class claims should not commence a distinct appellate deadline. Two appeals should not be compelled when one will do, and to hold otherwise would be both inefficient and wasteful. A single appeal is all that should be required, and that single appeal should lie from the final judgment, with "the review of intermediate rulings . . . await[ing] the final disposition of the case." *Griset*, 25 Cal 4th at 697.

### 2. **Preclusion of Beneficial Trial Court Adjudication.**

Second, as this Court recognizes, "early resort to the appellate courts tends to produce uncertainty and delay in the trial court," *Morehart*, 7 Cal.4th at 741 n.9, as well as divest the trial court from jurisdiction to hear beneficial prejudgment motions. These policy consequences again strongly counsel against the Court of Appeal's holding.

Compelling a litigant to file a prejudgment appeal will leave trial courts uncertain regarding the extent of their ability to enter rulings in the portion of the case that remains given the divestiture of jurisdiction that is engendered by the filing of a notice of appeal. Such a rule may also lead the parties to requests stays (from the trial court and/or court of appeal), to fight unnecessary jurisdictional battles, to contest the extent and degree of bond requirements, and to otherwise participate in disputes that are avoided by the bright-line one final judgment rule that requires an appeal only after the trial court has finished its adjudication and a entered final judgment.

The Court of Appeal's holding also would preclude a trial court from hearing beneficial motions that would modify, shape, and perhaps negate entirely the necessity for an appeal. Under the one final judgment rule, "[u]ntil a final judgment is rendered the trial court may completely obviate an appeal by altering the rulings from which an appeal would otherwise have been taken." *Id.* By contrast, under the Court of Appeal's holding, once a plaintiff has filed the required prejudgment appeal after a minute order sustaining a demurrer, even though no judgment has yet been entered, the filing of the appeal would divest the trial court of jurisdiction to modify its order either via motion or *sua sponte*.

The present case is a prime example. The demurrer was granted on April 27, 2009, and approximately ten days later, plaintiff filed a motion for reconsideration, the merits of which the trial court did not hear until more than 60 days later. Under the Court of Appeal's rule, because the deadline to appeal the grant of a demurrer to a complaint that contains putative class allegation commences from the date of the order, the required filing of this appeal within 60 days would divest the trial court of jurisdiction to entertain

even meritorious motions for reconsideration, at least with respect to the class claims.

Thus, although a trial court in such a setting might recognize that it had erroneously dismissed the lawsuit, and reinstate the individual claims (for which no appeal, pursuant to the final judgment rule, was yet permitted), it would be powerless to reinstate the class claims that were dismissed on identically erroneous grounds given the pending appeal. This results not only in an unnecessary appeal, but also precludes the trial court's consideration of a motion that this Court has expressly protected with the one final judgment rule. *Berri*, 43 Cal.2d at 860 (noting that the final judgment rule permits parties to file and maintains a trial court's jurisdiction to consider motions for reconsideration to the grant of a demurrer by refusing to start the deadline for filing an appeal until after a final judgment is entered).

The Court of Appeal's holding would similarly prevent the trial court from "provid[ing] a more complete record which dispels the appearance of error or establishes that it was harmless," another benefit advanced by the one final judgment rule. *Morehart*, 7 Cal.4th at 741 n.9. Moreover, by consolidating the entire lawsuit into a single appeal, rather than disbursing it across multiple appeals, the one final judgment rule "assist[s] the reviewing court to remedy error (if any) by giving specific directions rather than remanding for another round of open-ended proceedings." *Id.*

In short, at both the trial and appellate levels, the benefits of the one final judgment rule are legion. The Court of Appeal's compelled filing of a prejudgment appeal substantially detracts from each of these important principles.

### 3. Improperly Burdens Representative Litigation.

Third, the Court of Appeal's ruling improperly burdens important representative and class action litigation, and also favors hypertechnical procedural dismissals rather than adjudication on the merits. Both results are disadvantageous.

This Court steadfastly recognizes the benefits of class action and other representative litigation; indeed, the holding in *Daar* is itself based on the importance of such litigation and the necessity of ensuring that plaintiffs obtain effective appellate review of dismissal of class action allegations. *Daar*, 67 Cal.2d at 699. The timeliness bar created by the Court of Appeal below stands in stark contrast to this policy, and instead creates a burden on class action litigation that exists in no other setting. The Court of Appeal's holding would require multiple, duplicative appeals in class action lawsuits, under penalty of a jurisdictional dismissal, notwithstanding the fact that the grant of an identical demurrer in a non-class action case would not result in such a dismissal.

The Court of Appeal has essentially transformed the attempt in *Daar* to *ensure* appellate review of class action dismissals into a doctrine that operates to *prevent* precisely such appellate review. Such a principle is not only profoundly misguided, but exactly contrary to the important public policy rationales that expressly motivated this Court in *Daar*.

When this Court has occasionally departed from the one final judgment rule, it has uniformly done so in order to *allow* adjudication on the merits and to *avoid* a jurisdictional dismissal. This Court's holding in *Daar* was one such example, and its holding in *Tenhet v. Boswell* (1976) 18

Cal.3d 150 is equally representative. The trial court in *Tenhet* granted a demurrer to the second and third causes of action in the complaint without leave to amend and granted a motion to strike the fourth and fifth causes of action, but inadvertently failed to make a ruling on the first cause of action. *Id.* at 153. Because the one final judgment rule would normally require that all causes of action be dismissed prior to an appeal, this Court was forced to address whether that principle compelled a jurisdictional dismissal. *Id.* Noting that its review of the record "left no doubt" that the trial court thought that the first cause of action was as equally deficient as the others, this Court cited with approval several cases that had modified the one final judgment rule in cases of "inadvertence or mistake," and decided to itself enter judgment on the first cause of action in order to preserve an appeal on the merits. *Id.* at 154-55.

While this Court has occasionally modified the one final judgment rule to *prefer* adjudication on the merits, it has never created an exception to this principle in an attempt to *avoid* such an adjudication and find instead a lack of appellate jurisdiction. This Court should not be the first to depart from this salutary line of authority. *Cf. Clark v. Beyrle* (1918) 160 Cal. 306, 311 (preferring adjudication on the merits "rather than to have the case go off upon hypertechnical considerations affecting the right to maintain the appeal").

### 4. Violates Strict Application of the One Final Judgment Rule.

Fourth, the Court of Appeal's departure from the one final judgment rule not only conflicts with longstanding appellate practice and policy, but also subverts both legislative and judicial intent.

"It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute." *People v. Mazurette* (2001) 24 Cal.4th 789, 792. "The primary statutory basis for appealability in civil matters is limited to the judgments and orders described in Section 904.1 of the Code of Civil Procedure, which essentially codifies the 'one final judgment' rule and provides that only final judgments are appealable." *Art Movers Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645.

The Court of Appeal's departure from the one final judgment rule conflicts with Section 904.1, as well as the longstanding practice on which this codification is based. The California Legislature has declared, consistent with a century of California practice and precedent, that the time to appeal commences not on the date of an order, but rather on the date of entry of final judgment. This legislative pronouncement further comports with this Court's repeated admonition that the one final judgment rule is "a fundamental principle" of California appellate practice. *Griset*, 25 Cal.4th at 697.

Given both this longstanding history and statutory constraint, courts have repeatedly held that "exceptions to the one final judgment rule should not be allowed unless clearly mandated." *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 968. It is for these reasons, among others, that the death

knell rule established in *Daar* is a "tightly defined and narrow concept," and is applicable only to a particular set of circumstances not found in the instant case. *Farwell*, 163 Cal.App.4th at 1547.

When, as here, a demurrer is sustained to the entirety of a complaint, no "clear and unambiguous" exception to the one final judgment rule exists sufficient to create an appealable order under Section 904.1. Particularly in light of the consistent judicial and legislative backdrop of the past century, the Court of Appeal's creation of a mandatory, jurisdictional prejudgment appeal is simply untenable.

### E. The Court of Appeal's Erroneous Holding Extends to Virtually Every Lawsuit.

Finally, the Court of Appeal's holding is pernicious not only in class action litigation – a bad enough result given the significance of such actions – but has equally deleterious consequences in every lawsuit in which a portion of the complaint contains a request for interlocutory relief, as virtually *every* complaint does.

The Court of Appeal held that an immediate appeal was required in the present case because the dismissal of the class allegations was (pursuant to *Daar*) an immediately appealable order with respect to those allegations. But what is true for class allegations is, by definition, equally applicable to other allegations subject to interlocutory appeal as well. Section 904.1(a) of the Code of Civil Procedure lists a plethora of such claims: requests for an attachment (§ 904.1(a)(5)), an injunction (§ 904.1(a)(6)), appointment of a receiver (§ 904.1(a)(7)), etc.

Under the Court of Appeal's holding, the grant of a demurrer to an entire complaint would necessarily create differential appellate deadlines

whenever *any* such allegations are contained therein. For example, under the Court of Appeal's rule, were a complaint to request both damages and an injunction (as many do), and the trial court to grant a demurrer to the entire complaint, this order would effectively constitute a denial of the request for an injunction and thereby compel the plaintiff to immediately appeal the portion of the demurrer that affected the injunction — under penalty of waiver — even before entry of final judgment. The same would be true for demurrers to any complaint that contained a request for an attachment, a receiver, or any other relief that the denial of which by statute or precedent allows an immediate appeal.

This Court, and the Court of Appeal, have heretofore held that the denial of such relief compels an immediately appeal only when *that relief*, rather than the entire complaint, has been dismissed. *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205. Even though the grant of a demurrer to an entire complaint dismisses these immediately appealable claims as well as the remainder of the complaint, no California authority has *ever* held that in such cases a separate appellate deadline runs with respect to those claims from the date of the minute order. Instead, the rule has uniformly been the contrary, and this Court has consistently held that the deadline to appeal in such cases runs exclusively from the date of the final judgment. *See, e.g.*, *Agard*, 39 Cal. at 297-98 (grant of demurrer did not allow appeal until final judgment entered even though complaint dismissed on demurrer included request for injunctive relief and specific performance); *Harmon*, 176 Cal. at 760-61 (grant of demurrer did not allow appeal even though complaint requested injunction); *Lavine*, 48 Cal.2d at 612-14 (holding that appeal was timely even though filed more than sixty days after grant of a demurrer to a complaint that requested injunction); *see also Youngblood*, 22 Cal.3d at

650-51 (dismissing appeal when demurrer had been granted but no final judgment entered to complaint that demanded injunctive relief).

The Court of Appeal's holding that the grant of a demurrer compels an immediate appeal of the dismissal of any allegations which if dismissed *alone* would require an interlocutory appeal (e.g., class claims) is not only unprecedented and inconsistent with this Court's precedent, but would also revolutionize California appellate jurisprudence, eviscerate the one final judgment rule, and compel multiple appeals with differential deadlines whenever a demurrer is granted to a complaint that contains *any* immediately appealable requests for relief. This is not, and should not, be the law, either in the present putative class litigation or in any other.

The Court of Appeal's holding substantially harms not only class action litigation, as well as the named and unnamed parties thereto, but also fairness, efficiency, and the conscientious administration of justice in non-class action litigation as well. The fact that this Court *permits* plaintiffs an appeal in class actions even when individual claims remain does not mean that an appeal upon final judgment is *precluded* when individual claims *do not* remain and the *entire* action has been dismissed in a single order granting a demurrer to the *entire* complaint without leave to amend. The Court of Appeal's holding is unprecedented, unwise and should be reversed.

## CONCLUSION

The one final judgment rule is a beneficial, easily-applied principle that calculates the time to appeal not from the date of any particular order, but rather from the date of entry of judgment. "Strong policy reasons underpin the one final judgment rule. . . . The interests of clients, counsel,

and the courts are best served by maintaining, to the extent possible, bright-line rules which distinguish between appealable and nonappealable orders." *Mid-Wilshire Assocs. V. O'Leary* (1992) 7 Cal.App.4th 1450, 1455-56.

The one final judgment rule is precisely such a clear, bright-line rule, and has the further benefit of support from and application in over a century of consistent jurisprudence by this Court. By contrast, the holding of the Court of Appeal's not only conflicts with precedent, but compels the filing of an interlocutory prejudgment appeal with all of its attendant detriments. As Justice Sabraw famously observed, such a rule

> permits a party who benefits from delay to frustrate the goals of promptness and certainty of adjudication. [Moreover, t]he possibility that an order is appealable can produce delay even where no one *wants* to impede the litigation. If the ruling *is* appealable, the aggrieved party *must* appeal or the right to contest is lost. Thus every exception to the final judgment rule not only forges another weapon for the obstructive litigant but also requires a genuinely aggrieved party to choose between immediate appeal and the permanent loss of possibly meritorious objections. The effect of this dilemma – the generation of unnecessary appeals – has been evident for a long time. [Citations] For all these reasons, exceptions to the one final judgment rule should not be allowed unless clearly mandated. . . . A definite rule is necessary to reduce both the temptation to file dilatory appeals and the compulsion to file protective ones.

*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 967-68 (emphases in original) (citations omitted).

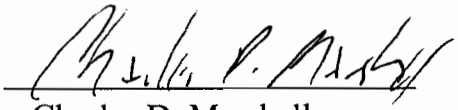
There was a single order here, on a single motion: the grant of a demurrer, without leave to amend, to the entire complaint. As this Court has consistently recognized, the deadline to appeal such a demurrer commences not on the date of the minute order, but on the date of the final judgment. The fact that a complaint contains putative (uncertified) class allegations in addition to individual allegations does not alter this longstanding principle, nor does it give rise — contrary to the decision of the Court of Appeal — to multiple appeals and two different appeal deadlines.

There was one order. There was one judgment. There should be one appeal, and the deadline for its filing should commence on the date of final judgment. This is the longstanding one final judgment rule, and this bright-line rule properly governs the present case. The Court of Appeal's holding to the contrary is erroneous and its dismissal of the appeal as untimely should be reversed.

DATED: April 19, 2010

Respectfully submitted,

**GREEN WELLING, P.C.**

By: 

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## CERTIFICATE OF SERVICE

I, Cynthia Thomas, hereby declare as follows:

I am employed by Green Welling, A Professional Corporation, 595 Market Street, Suite 2750, San Francisco, California 94105. I am over the age of eighteen years and am not a party to this action. On April 19, 2010, I served the within document(s):

**OPENING BRIEF ON THE MERITS**

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

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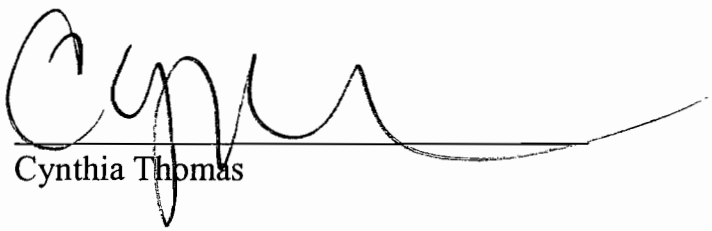
I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed April 19, 2010, at San Francisco, California.



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