No. S233983

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MIKE HERNANDEZ, *et al.*,

Plaintiffs and Respondents,

v.

FRANCESCA MULLER,

Plaintiff and Appellant;

RESTORATION HARDWARE, INC.,

Respondent.

SUPREME COURT
FILED
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Deputy

After a Decision of the Court of Appeal, Fourth Appellate District, Div. 1, No. D067091;
San Diego Superior Court, Central Div., No. 37-2008-00094395-CU-BT-CTL
Hon. William S. Dato, Judge

APPELLANT FRANCESCA MULLER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Having read Class Counsel's Answer Brief on the Merits (hereinafter "ABM"), Class Member-Appellant Muller (hereinafter "Class Member-Appellant")[1] is struck by the fact that rather than engage substantively with the arguments she has raised in her Opening Brief on the Merits (hereinafter "OBM"), Class Counsel have instead chosen various types of obfuscation. These take the form of mischaracterization of Class Member-Appellant's arguments; misstatements regarding the facts of the case and/or the law that applies; the assertion of legal principles that have no basis in class action law, and last but not least *ad hominem* attacks against Class Member-Appellant and her counsel. After discounting all these distractions, the little of substance that remains is woefully unpersuasive.

Class Counsel's Answer Brief is doubly troubling in that this is not merely two sets of arguments passing in the night (so to speak). Class Counsel have chosen to employ tactics of distraction and confusion rather than assist the Court in intelligently analyzing the issues involved in this appeal. Such tactics should not be acceptable at any level of the judicial process, but to raise such arguments before our Supreme Court is particularly inappropriate. It is strikingly disrespectful to a process that culls only 70 cases out of 7,000 requests for review. This Court should make sure that such tactics do not go unremarked.

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[1] Class Counsel repeatedly refer to Class Member-Appellant Muller as "Petitioner" in their Answer Brief on the Merits. As the appellation "Petitioner" is applicable to the Petition for Review, Ms. Muller will be referred to as "Class Member-Appellant" for the purposes of this Reply Brief on the Merits.

ARGUMENT

I.

CLASS COUNSEL'S CLAIM THAT CLASS MEMBER-APPELLANT HAS NOT PROVIDED ANY REASONS TO OVERRULE THIS COURT'S DECISION IN *EGGERT* IS INCREDULOUS

Class Counsel's assertion that Class Member-Appellant "has not provided this Court with any reason to overturn *Eggert*" [*Eggert v. Pacific States Savings and Loan Co., et al.*, 20 Cal.2d 199 (Apr. 21, 1942] (ABM at 1) is indicative of the consistent lack of credibility of the arguments presented throughout their brief. It is simply ludicrous in light of Arguments I, II, III, IV, and VI, at pages 14-29 and 34-39 of Appellant's Opening Brief on the Merits, which specifically discuss numerous reasons why this Court should reconsider and then overrule *Eggert* and its progeny, namely *Hernandez, et al.; Francesca Muller v. Restoration Hardware, Inc.*, 245 Cal.App.4th 651 [199 Cal.Rptr.3d 719], 2016 Cal.App. LEXIS 185 (4th App. Dist., Div. 1, Mar. 14, 2016) (hereinafter "*Restoration Hardware* decision"). In order to demonstrate the fatuousness of this assertion, Class Member-Appellant recapitulates those reasons here.

A. It Is Appropriate to Reconsider the 75-Year-Old *Eggert Decision.*

This Court's 75-year-old decision in *Eggert* is a remnant of a bygone era. (See OBM discussion at 14.) *Eggert* does not reflect modern class action practice. It is a relic of California practice from 75 years ago. In light of the significant changes in California class action practice, ushered in by the 1966 federal revision of Rule 23 and particularly as a result of subsequent California appellate court decisions, the question of the necessity for intervention by unnamed class members, reflected by this

Court's 1942 *Eggert* decision, should be reconsidered and officially abandoned.

B. *Eggert* Did Not Discuss the Public Policy Implications of Its Decision.

Eggert is a two-page decision bereft of any discussion of policy justifications to support a requirement of intervention by an unnamed class member. (See OBM discussion at 15.) *Eggert* provides no discussion regarding why intervention was advisable in 1942, much less offer any principles that can guide policy development 75 years later as to why intervention is both "fair and efficient" (ABM 1, 24).

C. Numerous California Appellate Courts Have Not Followed *Eggert.*

Over the past 42 years (with only one exception in addition to the instant case), eight California appellate courts have abandoned the *Eggert* holding and created in its place a modern approach to the appellate rights of unnamed class members. (See OBM discussion at 15, and Argument II, Section B, at page 6, *infra.*)

D. *Eggert and Restoration Hardware* Do Not Reflect Good Public Policy.

Contrary to Class Counsel's assertion that "[*Eggert*] is good policy...." (ABM 1), nothing could be further from the truth. Eight courts of appeal's decisions over the last 42 years since *Eggert* confirm that Class Counsel's assertion is without merit.

Intervention adds nothing to what is already required by virtue of the filing of formal objections and appearance at the settlement fairness hearing. Intervention requires more work for an unnamed class member-objector, but not only that, more work for class counsel, more work for defendants' counsel, more work for trial court judges, and more work for

appellate court judges, all for no benefit. Such added work is unnecessary and provides no benefit to any of the participants.

E. *Eggert* Is Not Compatible to the *Restoration Hardware* Fact Pattern.

Contrary to the assertion of the *Restoration Hardware* decision, *Eggert* is not on "all fours" (at 659) with the instant case. The failure to provide notice to the class was the issue in the trial and appellate courts in *Restoration Hardware*, while the class in *Eggert* received notice. As a result, the cases are not comparable. (See OBM discussion at 11-12, and Argument II, Section A, at page 5, *infra*.)

F. The *Restoration Hardware* Decision Is Contradicted by the *Marsh* Exception.

Class Member-Appellant argued that *Restoration Hardware's* reliance on *Marsh v. Mountain Zephyr, Inc.*, 43 Cal.App.4th 289 [50 Cal.Rptr.2d 493] (4th App. Dist., Div. 1, Mar. 6, 1996), to support its invocation of *Eggert* is totally misplaced. (See OBM discussion at 28-29.) *Marsh* acknowledges that an exception from formal intervention exists where an individual is "bound by the doctrine of res judicata" (as are unnamed class members in class actions). In point of fact, the *Restoration Hardware* decision specifically acknowledges that unnamed class members who do not opt out are "bound by the judgment" (at 654, 662).

G. *Restoration Hardware's* Rejection of *Trotsky* Was Based on a Mistakenly Asserted Conflict in Federal Authority.

Class Member-Appellant argued that contrary to the *Restoration Hardware* decision, federal jurisprudence is not in dispute on the issue of intervention. An intervention requirement was rejected for the entire federal system as a result of the United States Supreme Court decision in

Devlin v. Scardelletti, 536 U.S. 1 (June 10, 2002). (See OBM discussion at 24-27.)

The federal authorities relied on by the *Restoration Hardware* decision, *Croyden Associates v. Alleco, Inc., et al.*, 969 F.2d 675 (8th Cir. July 13, 1992), and *Felzen v. Andreas, et al.*, 134 F.3d 873 (7th Cir. Jan. 21, 1998), were superseded by the 2002 *Devlin* decision. Unnamed class members in all circuits now have appellate status without the need to formally intervene.

II.

CLASS COUNSEL FAIL TO ADDRESS NUMEROUS ARGUMENTS RAISED IN CLASS MEMBER-APPELLANT'S OPENING BRIEF ON THE MERITS

A. *Restoration Hardware* Is Not on "All Fours" with *Eggert.*

Class Counsel fail to address Class Member-Appellant's contention (OBM 11-12) that the *Restoration Hardware* court's conclusion at page 659 of the decision that "*Eggert* appears to be on 'all fours' with the present action...." is wrong. *Restoration Hardware* is not on all fours with *Eggert.* The *Restoration Hardware* decision simply ignores the elephant in the room: Notice. Notice, the principal issue below in both the trial and appellate courts was provided to unnamed class members in *Eggert.*

> The court also made an order, directed to plaintiff and all other persons interested, to show cause why it should not make an order fixing reasonable attorneys' fees. Notice of the order was published daily until the return date.

Eggert, supra, 20 Cal.2d at 200 (emphasis added).

B. An Overwhelming Number of Appellate Courts throughout California Have Not Followed *Eggert.*

An overwhelming majority of California's courts of appeal have addressed the intervention issue as regards appellate standing for unnamed class members and found that an intervention requirement is contrary to public policy. (See OBM discussion at 17-23.)

The *Restoration Hardware* decision is contrary to eight prior California courts of appeal's decisions, commencing with the 1975 decision in *Trotsky v. Los Angeles Federal Savings and Loan Ass'n, et al.*, 48 Cal.App.3d 134 [121 Cal.Rptr. 637] (2d App. Dist., Div. 5, May 6, 1975), and continuing through the 2015 decision in *Roos v. Honeywell International, Inc.*, 241 Cal.App.4th 1472 [194 Cal.Rptr.3d 735] (1st App. Dist., Div. 1, Nov. 10, 2015). Indeed, prior to the instant case, *Eggert* had been ignored in the modern period of class action litigation with the exception of one reported case, *Sherman v. Allstate Ins. Co.*, 90 Cal.App.4th 121 [108 Cal.Rptr.2d 722] (2d App. Dist., Div. 7, June 25, 2001).[2]

Class Counsel did not address the merits of any of these cases, other than to urge they be disregarded as inconsistent with *Eggert*. (ABM at 24.) Thusly, Class Counsel's argument mandating intervention would require this Court to overrule at least eight other courts of appeal's decisions covering a forty-two year period.

---

[2] Shepardizing *Eggert* discloses that only one published authority, *Sherman v. Allstate Ins. Co.*, 90 Cal.App.4th 121 [108 Cal.Rptr.2d 722] (2d App. Dist., Div. 7, June 25, 2001), relied on *Eggert* to support a holding that an unnamed class member in a class action needs to intervene in order to obtain appellate standing.

In the First Appellate District:

- 1984 decision in *Simons v. Horowitz, et al.*, 151 Cal.App.3d 834 [199 Cal.Rptr. 134] (1st App. Dist., Div. 3, Feb. 7, 1984) (ignored by *Restoration Hardware*);
- 1990 decision in *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117 [269 Cal.Rptr. 844] (1st App. Dist., Div. 2, May 25, 1990) (ignored by *Restoration Hardware*);
- 2008 decision in *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413] (1st App. Dist., Div. 1, Apr. 21, 2008) (ignored by *Restoration Hardware*);
- 2015 decision in *Roos v. Honeywell International, Inc.*, 241 Cal.App.4th 1472 [194 Cal.Rptr.3d 735] (1st App. Dist., Div. 1, Nov. 10, 2015) (ignored by *Restoration Hardware*).

In the Second Appellate District:

- 1975 decision in *Trotsky v. Los Angeles Federal Savings and Loan Ass'n, et al.*, 48 Cal.App.3d 134 [121 Cal.Rptr. 637] (2d App. Dist., Div. 5, May 6, 1975).
- 2005 decision in *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc.* (hereinafter *Mrs. Gooch*), 127 Cal.App.4th 387 [25 Cal.Rptr.3d 514] (2d App. Dist. Mar. 7, 2005).

In the Sixth Appellate District:

- 2001 decision in *Wershba v. Apple Computer*, 91 Cal.App.4th 224 [110 Cal.Rptr.2d 145] (6th App. Dist. July 31, 2001).

And, an earlier Fourth Appellate District decision:

- 2006 decision in *Consumer Defense Group v. Rental Housing Industry Members,* 137 Cal.App.4th 1185 [40 Cal.Rptr.3d 832] (4th App. Dist., Div. 3, Mar. 24, 2006) (ignored by *Restoration Hardware*).

C. The *Restoration Hardware* Court Completely Misunderstood the *Devlin* and *Ortiz* Decisions.

Class Counsel provide no counterarguments to Class Member-Appellant's argument that the *Devlin, supra,* and *Marino v. Ortiz, et al.*, 484 U.S. 301 (Jan. 13, 1988), decisions were entirely misunderstood by the *Restoration Hardware* court. Class Member-Appellant argued in her Opening Brief on the Merits that the *Restoration Hardware* decision misconstrued the *Devlin* and *Ortiz* decisions:

> Thus, because *Trotsky* relies on federal authority that has been at least undermined by contrary federal authority ... we conclude the cases on which Muller relies should not be followed.

Restoration Hardware, 245 Cal.App.4th at 661 and 662 (emphasis added). (See OBM discussion at 24-26.)

Restoration Hardware holds that there is a conflict in federal authority:

> We acknowledge the federal decisions, even from the United States Supreme Court (compare *Marino v. Ortiz* (1988) 484 U.S. 301 ... [nonparty class members who did not seek to intervene may not appeal approval of settlement] with *Devlin v. Scardelletti* (2002) 536 U.S. 1 ... [reaching opposite conclusion without disapproving *Marino*]), are not uniform.

Restoration Hardware, 245 Cal.App.4th at 662 n.6 (brackets in original; underline added).

Class Member-Appellant pointed out that the *Restoration Hardware* decision characterized *Marino v. Ortiz* as involving "nonparty class members." This is factually incorrect. The *Ortiz* appellants had not been class members. (OBM 25.) That meant that the purported conflict of authority in fact did not exist, thereby completely undercutting *Restoration*

Hardware's claim that the United States Supreme Court jurisprudence was not uniform.

Class Counsel's only response to losing the key argument for a requirement for intervention: "But *Devlin* is not binding on this Court." (ABM 21), is a red herring. Class Member-Appellant never argued that this United States Supreme Court decision is binding on a California court.

Class Counsel's associated comment was a further deflection:

> The appellate court did not commit any error by considering the policies articulated in federal court decisions pre-dating *Devlin*.

(ABM 21.)

The error of the *Restoration Hardware* court had nothing to do with merely "considering the policies" that predate *Devlin*. Class Counsel failed to counter Appellant's arguments that the *Restoration Hardware* court did commit error by:

(i) citing pre-*Devlin* cases as federal authority, despite their having been overruled by *Devlin*, and

(ii) representing the holdings in *Devlin* and *Ortiz* as not being uniform.

D. Class Counsel Provided No Counterargument to Class Member-Appellant's Refutation of the Purported Benefits of Intervention.

Class Counsel failed to respond to the refutations of *Restoration Hardware's* claims of the benefits of intervention, in which Class Member-Appellant explained that these purported benefits were apocryphal:

(1) the "putting the defendant on notice" benefit (OBM 35);

(2) the supposed "clear avenue " benefit (OBM 35-36);

(3) the objections "could not be ignored" benefit (OBM 36).

III.

NOT CONTENT WITH FALSELY CLAIMING THAT CLASS MEMBER-APPELLANT PROVIDED NO REASONS TO OVERTURN *EGGERT*, CLASS COUNSEL RELY ON ADDITIONAL DISTRACTIONS

The vast majority of Class Counsel's Answer Brief on the Merits is composed of falsehoods, irrelevancies, and, surprisingly, entirely fabricated law. Argument III below will attempt to identify, catalog, and respond to each of these distractions.

A. Class Counsel Invented Their Own Legal Requirements for Class Actions.

1. Class Counsel offer a striking number of repetitious claims that in order to appeal, objecting class members either should be required – or <u>are</u> required – to become representative plaintiffs for the class with fiduciary responsibilities. Such claims are not merely irrelevant to the issue before this Court; they have been unknown to class action case law jurisprudence for at least the last 42 years:

> Allowing class members to appeal a class judgment without committing to represent the class....

(ABM 10.)

> But an unnamed class member should not, merely by virtue of being in the class, have a right to appeal that is not tethered to any fiduciary duty to the class.

(ABM 13.)

> 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.

(ABM 9.)

The requirements for a representative class plaintiff and fiduciary are completely different from those for intervention to obtain

party status – they have nothing to do with each other. Class Counsel are conflating intervention by an individual unnamed class member to obtain appellate status with a representative plaintiff's responsibility to represent the entire class. Intervention has nothing to do with class representation or fiduciary duties to the class. Someone intervenes merely to get party status, not to replace the representative plaintiff or become an additional representative plaintiff.

A class member's right to appeal is an individual right (whether she is raising the objection for herself only, for herself and the class, or just for the class). It is simply unrelated to a legal obligation to advance the interests of unnamed class members generally. Even if unnamed class members were required to intervene, that still would have nothing to do with a class representative with fiduciary obligations.

Finally, *Eggert* itself, as well as *Croyden Associates, supra,* and *Felzen v. Andreas, supra,* says nothing about an unnamed class member acting as a class representative fiduciary who promotes the class's interests.

While Class Counsel repeatedly argue these erroneous concepts in their Answering Brief, repeating them multiple times does not make them valid:

> Requiring an objecting class member to become a party also helps safeguard the integrity of the class action device by coupling the right to appeal with the responsibilities to the class intended to be borne by a named plaintiff. Divorcing the responsibilities of a named plaintiff from the right to appeal....

(ABM 2.)

> Requiring an objector to be a party means she would have to take on some of the risks that class representatives must bear.

(ABM 12.)

> If Petitioner were truly interested in the best interests of the class, she would have sought to intervene and been willing to take on the responsibilities of a class representative. She did not. She has no standing to appeal.

(ABM at 16.)

> [O]bjecting class members who make a credible showing that in pursuing their objections they intend to act and are capable of acting on behalf of and in the interest of all class members....

(ABM at 2.)

There is no legal basis for these arguments. They constitute a radical attempt to change the substantive law of class actions.

2. Class Counsel's assertion that:

> If an unnamed class member does not believe the settlement is in her best interest, she can opt out.

(ABM 18), is not part of this case. As Class Member-Appellant argues herein, there was no opportunity to opt out because there was no settlement of the class's claims. Furthermore, Class Counsel's assertion is wildly inconsistent with their arguments on one-way intervention based on *Fireside Bank v. Superior Court of Santa Clara Co., et al.,* 40 Cal.4th 1069 [56 Cal.Rptr.3d 861] (Apr. 16, 2007) (ABM 16). The whole point of that case is that class members must either opt out or be bound by the judgment, before the class claims have been adjudicated.

On June 4, 2013, the following undated "Notice of Pendency of Class Action" was e-mailed to Class Member Muller:

> If you are a member of the Class, you can either stay in the lawsuit and receive any benefits that the Class may receive or you can ask to be excluded from the Class. The last day to postmark a request for exclusion from the Class is August 3, 2013.

The opt-out opportunity thus occurred in August 2013, before the trial court made any determination on the merits of the class's claims in March of 2014 (OBM 7-8) and before any settlement was reached on the attorneys' fee issue in July 2014. (See pages 17-18, *infra*.)

B. Class Counsel Make Numerous Factually Incorrect Assertions and Arguments.

1. Contrary to Class Counsel's assertions, it is not true that *Eggert* "is not only the existing law in California" (ABM 1) but "is a critical component of California law" (ABM 24) that "protects the fairness and efficiency of class actions") (ABM 10). *Eggert* is not, practically speaking, the existing law in California. Because it is not being applied anywhere (see Argument II, Section B, *supra*), it certainly cannot be a critical component of California law and cannot protect the fairness and efficiency of the class action mechanism. Forty-two years of class action jurisprudence since *Trotsky* confirm this!

Quite simply, *Eggert* has been ignored by generations of California appellate courts until it was resurrected by a Fourth Appellate District Court, Division One panel, in the *Restoration Hardware* decision.

2. Class Counsel's assertion:

> "An intervention requirement requires objectors to make their best case to the trial court first."

(ABM 2), creates the false implication that existing class action procedures are inadequate. Under ubiquitous current class action practices in both and federal and state courts, class members who wish to object must make their "best case to the trial court" in a written pleading prior to the settlement fairness hearing that lists all their supporting reasons for any objections made. See California Rules of Court (CRC), Rule 3.769(f), Notice to Class of Final Approval Hearing, as typical of this requirement:

> If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.

(Emphasis added.)

Intervention pleadings would add nothing to this primary obligation and would provide no additional benefit to anyone involved: the class members, class counsel, defendants' counsel, or the judiciary. At best, it would be a repetitive exercise, and at worst it would multiply the proceedings and thusly the time and expense to all concerned.

3. Class Counsel complain that appeal without intervention "imposes no costs or consequences for frivolous appeals." (ABM 13.) This assertion is simply untrue. There is already a mechanism in place to combat frivolous appellate litigation. It is a motion before the appellate court asking that the appeal be sanctioned on grounds of frivolousness. Under California Rules of Court, Rule 8.276(a), sanctions can be awarded for the taking of a frivolous appeal:

> On motion of a party or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs under rule 8.278, on a party or an attorney for:
> (1) Taking a frivolous appeal....

4. Although Class Counsel argue that the reasoning of *Trotsky* "and its progeny" (ABM 24) should be rejected, several of the cases identified by Class Member-Appellant as rejecting the need for intervention by unnamed class members are not "progeny of *Trotsky*." Several do not mention *Trotsky* at all. (See OBM discussion at 16.)

For example, *Simons, supra,* relies on state law and cases other than *Trotsky*, and federal authorities other than those relied on by *Trotsky* as well as public policy.

> "Absent class members are 'parties' for purposes of being bound by the judgment ... and having standing to appeal from decisions and object to settlements." (2 Newberg, *supra*, Rights and Obligations of Absent Class Members, § 2830, p. 1260.)
> ....
> As a member of that class, Horowitz was an aggrieved party to the action. Under California law, any party aggrieved may appeal an adverse judgment. (*Code Civ. Proc., § 902.*) Horowitz therefore did not need to obtain "permission" to intervene, and could simply appeal the trial court's judgment by filing a notice of appeal.

Simons, supra, 151 Cal.App.3d at 843.

C. Class Counsel Fill Their Answer Brief with Flatly Irrelevant and/or Misleading Assertions and Arguments.

1. Class Counsel accused Class Member-Appellant of "failing even to file a written objection before the hearing on attorney fees." (ABM 2, 15.) The accusation is both irrelevant to the issue before this Court – whether she had standing to appeal – as well as misleading.

Because the settling parties and the trial court had failed to provide notice of the fee hearing to class members, there was no procedure in place for the filing of objections.

2. Class Counsel's accusation that Class Member-Appellant "remained on the sidelines throughout the litigation...." (ABM 2, 17), again is both irrelevant as to whether she has standing to appeal and, in point of fact, untrue. Class Member did not remain on the sidelines. She entered an appearance as directed by the parties' Notice of Pendency. (OBM 6, 7.)

3. Class Counsel's assertion that "Petitioner was free to voice any concerns about the claims process to the trial court." (ABM 17-18; emphasis added), is again both irrelevant and misleading. In the first place, what Class Member-Appellant could have done before the trial court has nothing to do with the issue of her standing to appeal. In addition, the assertion is misleading because the "claims process" (ABM 18) is not and never has been a point of contention in this case.

Finally, the terminology "free to voice any concerns" is additionally an attempt to sidestep the fact that neither Class Member-Appellant nor unnamed class members generally were provided with a formal procedure to object to Class Counsel's attorneys' fee request before the trial court. In other words, class members are "free to voice concerns" about claims, but are not able to formally object to the amount of Class Counsel's attorneys' fee request.

4. Class Counsel's assertion that "The attorney fee award was not negotiated as part of a settlement on the merits." (ABM 6), is irrelevant to the issue of Class Member-Appellant's appellate standing. It is in fact a straw man argument.

Class Member-Appellant never claimed that the amount of the fee was "negotiated as part of the settlement on the merits." The merits of the class's claims have never been an issue – those claims were decided by the trial court.

5. The assertion that "Petitioner made no attempt to make a clear record below of her objections." (ABM 15), is again irrelevant to the issue before this Court – the dismissal of Class Member-Appellant's appeal by the court of appeal on the ground of standing.

Furthermore, the statement is untrue. Class Member-Appellant filed a Request for Clarification and attended a fairness hearing in which Class Counsel's attorneys' fee motion was presented (OBM 9).

Her written pleading and the colloquy between Class Member-Appellant's counsel, Class Counsel, and the trial court judge at the hearing provided a clear record regarding her arguments. (OBM 13; see also Rep. Appeal Tr. 9/5/14, Vol. 1, generally.)

6. Class Counsel offer a strategically inaccurate chronology of their fee request that is irrelevant to the matter on appeal (see OBM 8-9).

> Class Counsel filed a motion for attorneys' fees in the amount of $9,103,087.50, or 25% of the $36,412,350.00 judgment amount. Defendant agreed not to oppose a request up to this amount.

(ABM 5, citation omitted.) This statement conflicts with Class Counsel's declaration in support of their fee request in which they describe how they had directly negotiated a settlement of their fee request with the Defendant before, not after, Class Counsel filed their motion in the trial court:

> After meeting and conferring at arms-length with Restoration Hardware to avoid further litigation on this issue, Class Counsel agreed to request only 25% of the common fund and Restoration Hardware agreed not to oppose this request.

(See OBM discussion at 8-9 [Decl. James R. Patterson in Support of Mot. for an Award of Attorneys' Fees, etc., filed 7/18/14 (Respondent's Appendix at 122:12-14)].)

This issue is not relevant to the issue before this Court. It is however highly relevant to the appeal below because there was a settlement privately negotiated (in Class Counsel's own words, the so-called "clear sailing concession"[3]) prior to their filing their motion for attorneys' fees. Appellant argued that a settlement of the attorneys' fee issue triggered the notice requirements of California Rules of Court, Rule 3.769(f).

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[3] "And the "clear sailing" agreement was nothing more than a concession by Class Counsel...." (ABM 6).

7. Class Counsel's assertion regarding the so-called "clear sailing" agreement:

> A clear sailing agreement was reached ***after*** the trial court determined the merits of the class members' claims through an adversarial process

(ABM at 6; emphasis in original), is irrelevant to the issue before this Court, and it is misleading as well. The significant legal issue is that the agreement was reached before Class Counsel filed their motion for attorneys' fees (see CRC, Rule 3.769(f)).

8. Class Counsel's assertion that:

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

(ABM 4) is entirely irrelevant.

(a) In the first place, there is no discussion of why this fact is significant or relevant to any issue before any court.

(b) Beyond that, there is no evidence in the record that the Final Statement of Decision, entered July 3, 2014, was provided to anyone other than the settling parties.

(c) Class Member-Appellant never raised any concerns about the claims process, making this point a red herring.

(d) Finally, there is no recognition that Class Member-Appellant did in fact object to the arguably more important proposed Final Judgment.

9. Class Counsel's assertion that:

> Petitioner should not be entitled to a "do over" at the end of the litigation because she prefers a different result.

(ABM at 20) is again not only irrelevant to any issue before this Court on the question of appellate standing but entirely irrelevant.

To be clear, it is not true that Class Member-Appellant is seeking a "different result" (ABM 20) as regards the class's claims. What she wants is compliance with due process and CRC Rule 3.769(f).

10. Class Counsel's assertion that:

> The intervention requirement does not limit in any way a class member's important right to appear and object in the trial court.

(ABM at 15), is irrelevant, misleading, and a straw man.

Class Member has never argued that intervention would limit a class member's right to appear and object in the trial court. The issue between the parties to this appeal has nothing to do with class member status "in the trial court."

The issue before the court of appeal was whether class members were given proper notice of the amount of the fee sought by their counsel and the ability to object to the amount sought. An intervention requirement is unrelated to that question. The issue before this Court is the legal issue of whether intervention is necessary to secure a right of appeal.

11. Class Counsel offer an extended discussion of the implications of *Fireside Bank v. The Superior Court of Santa Clara Co., supra*. *Fireside*, however, addresses a sit-on-the-sidelines-and-wait-for-the-court-to-rule-on-the-merits problem, which is not at all applicable to the facts of either *Restoration Hardware* or *Eggert, supra*. (ABM 17.)

Because the *Restoration Hardware* class had been certified and the opt-out period had closed long before the attorneys' fee determination (the issue on appeal below), *Fireside Bank* is inapplicable and entirely irrelevant to *Restoration Hardware's* appellate standing issue.

12. Class Counsel's response to Class Member-Appellant's argument regarding *Jasmine Networks, Inc. v. The Superior Court of Santa*

Clara Co., 180 Cal.App.4th 980 [103 Cal.Rptr.3d 426] (6th App. Dist. Dec. 29, 2009):

> California courts are not bound by the standing requirements under Article III of the U.S. Constitution....

(ABM at 26) is, of course, true and beside the point.

Class Member-Appellant raised the issue (OBM 45, 46) to offer this Court an opportunity to clarify a subtle question relating to the use of a "standing" legal analysis as discussed in the *Restoration Hardware* decision. Several courts (*Jasmine Networks* in California (see OBM discussion 45-46); the U.S. Supreme Court in *Devlin v. Scardelletti, supra*; and the Ninth Circuit in *Churchill Village, L.L.C. v. General Electric, et al.*, 361 F.3d 566 (9th Cir., San Francisco, Mar. 16, 2004)) have noted that "standing" is not the correct method of legal analysis for the issue in the instant appeal.

> But the issue is not precisely one of standing. As the Supreme Court has noted, neither Article III nor prudential standing is implicated by the efforts of non-intervening objectors to appeal class action settlements.

Churchill Village at 572.

While Class Counsel are clearly uninterested in the issue, Class Member-Appellant hopes that the Court will find *Jasmine's* observation worthy of consideration.

D. Without Offering the Slightest Bit of Evidence in Support Thereof, Class Counsel Assert Problems with the Class Action Mechanism That Purportedly Justify Intervention by Unnamed Class Members.

Appeals of class action decisions by unnamed class members have been occurring for the past 42 years without class members having first

intervened. Courts and the class action mechanism itself have gotten along just fine without *Eggert* and its requirement for intervention. *Eggert* has not been actively applied to class actions for generations, making the raft of "problems" Class Counsel claim intervention purportedly solves completely fictitious.

None of the parade of horribles cited by Class Counsel have ever been found to present a serious enough obstacle to justice that anything was done to restrict such appeals – until now. The burden to demonstrate the existence of a problem – or problems – is on Class Counsel, and they did not provide any evidence or legal authority to meet that burden.

1. Class Counsel assert that *Eggert* is necessary to prevent professional objectors' frivolous appeals.

> Allowing class members to appeal a class judgment without committing to represent the class creates an incentive for professional objectors to file frivolous appeals.

(ABM at 10.)

(a) Class Counsel provide neither evidence of the prevalence of frivolous appeals, nor evidence that they represent a significant problem. (ABM 10.) Nonetheless, they ask this Court to overturn 42 years of appellate precedent to solve non-existent problems.

(b) Class Counsel provide no explanation of how the requirement of intervention would result in the actual thwarting of professional objectors. Their use of the very term "professional" implies that such objectors would not be hindered by a requirement of intervention. Arguably, a motion for intervention, along with the status of a representative plaintiff, would play right into the hands of the very professional objectors Class Counsel are worried about.

2. Class Counsel assert that *Eggert* is needed to protect the fairness and efficiency of class actions. (ABM 10.)

In making this argument, Class Counsel offer no evidence to support an allegation that the class action mechanism is troubled by problems of either fairness or efficiency. More important than the lack of evidence, though, is that Class Counsel have it exactly backwards. It is the right of unnamed class members to appeal trial court rulings that is a crucial procedural protection to ensure the integrity and proper functioning of the class action mechanism. As noted by Seventh Circuit Court of Appeals Judge Frank H. Easterbrook and by Professor Charles Silver, appellate review is an important protection for the proper functioning of the class action mechanism (not the existence of a "fiduciary court," a "fiduciary counsel," and a "fiduciary class representative" (see ABM 10)).

> Because a large proportion of class actions settl[e] or [are] resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed.... But, the more fundamental the question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal....

Blair v. Equifax Check Services, Inc., 181 F.3d 832, 835 (7th Cir. 1999) (emphasis added).

> Because trial judges who orchestrate settlements can be expected to approve them, the primary monitors of such settlements must [be] appellate judges.

Charles Silver, *Class Actions - Representative Proceedings*, Encyclopedia of Law & Economics 194, 216 (B. Bouckaert & G. De Geest, eds. 1999) (emphasis added).

3. Class Counsel argue that without intervention, "professional objectors" will discourage the filing of class actions.

> [P]rofessional objectors create a disincentive for class counsel to take on such risky matters.

(ABM at 11, citation omitted)

There is no evidence in this record that the current state of the law, in which unnamed class members may appeal class action decisions without first intervening, produces insufficient encouragement for attorneys to file class actions.

Class Counsel's assertion:

> Class Counsel have spent more than $100,000 in costs and time....

(ABM 2) is apparently intended to support an argument that the cost of defending an appeal will discourage attorneys from pursuing class actions. They conveniently fail to mention the importance of the right of appeal to our system of justice and the encouragement of the over $9 million attorneys' fee, which they sought and received in this case.

4. Class Counsel assert that allowing unnamed class members to appeal would threaten the manageability of class actions. (ABM 16-18.)

> Allowing an unnamed class member to appeal without intervening transforms a class action from a case commenced and litigated by a representative party in the trial court, to a case litigated by as many of the unnamed class members who choose to appeal in the appellate court.

(ABM 16.)

Again, there is no evidence in the record of any manageability problems in class actions. Appeals of class action decisions by unnamed class members have been occurring for the past 42 years without class members having first intervened. Courts and the class action mechanism itself have gotten along just fine without *Eggert* and its requirements for intervention.

E. Class Counsel's *Ad Hominem* Attack On Class Member-Appellant and Her Counsel Is Inappropriate in a Brief before This Court

Instead of offering substantive argument, Class Counsel's Answer Brief descends into extensive *ad hominem* attack on Class Member-Appellant and her counsel (ABM at 2, 10-11). These attacks seem intended to deflect the Court's attention away from the weak arguments in their Answer. Such attacks are particularly out of place in this Court since Class Member-Appellant has raised an issue that this Court has acknowledged is sufficiently important to warrant review.

1. Class Counsel accuse Class Member-Appellant and her counsel of wasting the Court's time.

> They have now filed a frivolous appeal....

(ABM at 2.)

(a) Class Counsel never argued to the trial court that the issues raised by Class Member-Appellant were frivolous. Furthermore, the trial court's discussion of the issues raised by Class Member-Appellant in no way suggests that the court viewed any of those issues as frivolous. (See Rep. Appeal Tx., 9/5/14, Vol. 1.)

(b) Class Counsel never asserted before the court of appeal that Class Member-Appellant's issues on appeal were frivolous.

(c) *Restoration Hardware's* reversal of 42 years of case law is a matter of serious substance. This challenge to a holding of that significance can hardly be considered frivolous.

(d) The fact that this Court granted review makes the instant case *per se* non-frivolous. By using the phrase "They have <u>now</u> filed a frivolous appeal" (ABM 2; emphasis added), Class Counsel appear to challenge this Court for accepting the matter for review. Such an argument is completely out of place.

2. Class Counsel's impugning of Class Member-Appellant's motives:

> The latter [proceeding in an effort to extract a fee by lodging a generic and unhelpful protest] is exactly what is happening in this case....

(ABM at 2), is entirely without evidentiary support. It is merely a scurrilous accusation. Class Member-Appellant's presence in this Court belies that argument.

3. Class Counsel falsely assert that:

> Petitioner and her counsel – a well-known "professional objector –

(ABM at 2.)

No evidence has been introduced into the record to support such an assertion. Again, Class Member-Appellant's presence in this Court belies such a claim.

4. Class Counsel's assertion that Class Member-Appellant and counsel:

> [U]ndoubtedly would have objected to [a settlement] regardless of the terms.

(ABM 2), is:

(a) irrelevant to the issue of whether Class Member-Appellant had standing before the court of appeal;

(b) irrelevant to the facts of the case in the court of appeal;

(c) impossible to substantiate, as well as being

(d) an improper *ad hominem* attack on Class Member-Appellant and her counsel.

These *ad hominem* attacks should be strongly admonished by this Court because, among other reasons, Class Member-Appellant is

seeking to enforce fundamental due process procedures to protect unnamed class members in class actions.

IV.

THE REMAINING ARGUMENTS IN CLASS COUNSEL'S ANSWER BRIEF ARE UNCOMPELLING

This Court's question on review is: Must an unnamed class member intervene in the litigation in order to have standing to appeal? The remaining arguments in Class Counsel's Answer Brief offer little of substance to justify intervention.

A. This Court Should Follow the Class Action Procedures of Arkansas, Not Its Own Courts of Appeal or the United States Supreme Court.

Class Counsel remarkably propose that this Court follow the lead of the Arkansas Supreme Court and ignore eight decisions of various California appellate courts, as well as the United States Supreme Court:

> Other courts have declined to apply *Devlin* to state class action procedures. In *Ballard v. Advance Am.* (2002) 349 Ark. 545, 549 ... the Arkansas Supreme Court rejected *Devlin* and held that intervention is a prerequisite for appeal in Arkansas courts:
>
> > ....
> > "[T]his court's opinion in *Haberman v. Lisle*, 318 Ark. 177 ... continues to be the controlling precedent in Arkansas."

(ABM 23, *citing Ballard v. Advance America, et al.*, 349 Ark. 543, 549, 79 S.W.3d 835, 2002 Ark. LEXIS 402 (Supreme Ct. July 5, 2002).)

Class Counsel provide no convincing argument as to why this Court should reject numerous California appellate court decisions and federal procedural rules, none of which require intervention, and follow instead the

jurisprudence of Arkansas. Indeed, Arkansas is an odd choice as a model for California.

B. *Trotsky* and Its Progeny Should Be Disregarded.

The *Trotsky* line of cases answers the Court's question with a clear "No." Class Counsel's response, on the other hand, is "Yes." Class Counsel then go on to assert their argument for disregarding *Trotsky* and its progeny: "*Eggert* Governs Here":

> Because an appellate court in California cannot overturn a Supreme Court decision, these decisions must be disregarded. This Court is the only court with the authority to overturn *Eggert*.

(ABM at 24; citation omitted.)

While the deference is laudable, it fails to acknowledge that this Court has implicitly asked the parties to argue whether *Eggert* should be overturned. Class Counsel have little to offer beyond vague assertions of protecting the fairness and integrity of the class action mechanism, arguments which had been unpersuasive to modern-day California and federal appellate courts. Class Member-Appellant has previously disposed of Class Counsel's public policy benefits of intervention argument. (See OBM discussion at 34-37.)

C. Class Member-Appellant Should Either Intervene or Be Bound By the Judgment.

Class Counsel argue a false set of options:

> She should either move to intervene if she believes the class is not adequately represented, or accept the judgment as a silent beneficiary of the work of class counsel and the class representatives.

(ABM 17.)

This is not the way the class action mechanism works. The point is that moving to intervene adds nothing but unnecessary work. Intervention accomplishes nothing more – other than the generation of more paperwork and attorneys' fees – than is already required by California Rule of Court, Rule 3.769(f), which is the obligation to file an objection and appear at a fairness hearing.

In *Restoration Hardware's* own words, unnamed class members who do not opt out are "bound by the judgment" (*Restoration Hardware* decision at 662). Class Counsel have turned the issue upside down. It is precisely because a class member is bound by the judgment that they have the right to appeal.

D. The Res Judicata Exception to Party Status under Code of Civil Procedure Section 902 Should Not Apply in Class Actions.

This section title is a direct quote of the section title of the Answer Brief in which Class Counsel ask that the *Marsh v. Mountain Zephyr, supra,* "exception" be sharply limited. (ABM 19.) In so asking, Class Counsel are acknowledging that the *Marsh* exception is current law for class actions. The burden is on them to justify a change in that status quo.

Appellant asserted (OBM 29) that *Restoration Hardware* had failed to note the exception in *Marsh:*

> One exception to the "party of record" requirement exists in cases where a judgment or order has a res judicata effect on a nonparty.

Marsh, supra, 43 Cal.App.4th at 295. Class Counsel argue that this holding of *Marsh* should not apply to class actions:

> But following Petitioner's argument, the exception would swallow the rule in class actions, defeating the representative nature of class actions....
>
> ....
>
> The [*Marsh*] court found standing, however, because Code of Civil Procedure section 2034, subdivision (i), contemplated

> that an expert witness would have standing to appeal an order setting an expert witness fee.

(ABM 19, *relying on Marsh, supra* at 295-96.)

It is problematic for Class Counsel's argument, however, that even the *Restoration Hardware* court cited *Marsh* as an authority applicable to class actions. (See *Restoration Hardware* decision at 657.)

In short, Class Counsel have failed to justify why the fact pattern, out of which the *Marsh* exception arose, should not be generalized to apply to class actions when *Restoration Hardware* generalized *Marsh.*

Finally, Class Counsel's overheated rhetoric as to the *Marsh* exception "defeating the representative nature of class actions" (ABM 19) comes straight out of *Restoration Hardware* regarding its reference to *Croyden Associates*:

> *Croyden* pointed out that class actions would become unmanageable and unproductive if each class member could individually appeal.

> (*Restoration Hardware* decision at 662, citing *Croyden Associates, supra,* 969 F.2d at 678.)

Croyden represents one pole of a controversy in the federal circuits as to the appeal rights of unnamed class members. That controversy was resolved over a decade ago by the U. S. Supreme Court in *Devlin v. Scardelletti*, 536 U.S. 1, which overturned the *Croyden* line of cases.

Unnamed class members in all circuits have been able to appeal without intervening since 2002. Amazingly (from the *Croyden* viewpoint), no crisis emerged as to the manageability of class actions. No evidence exists in the record that the current state of the law in California, in which unnamed class members can appeal without intervening, is in any way problematic. Class Counsel have not met their burden to justify a change in the law regarding the *Marsh* exception.

E. Class Counsel Exaggerate the Legal Significance of Post-*Devlin* Court Decisions.

> Following *Devlin*, courts have questioned its application to cases where class members have the right to opt out.

(ABM 23.)

Even though some courts have questioned *Devlin,* none has sought to overrule it.

> [W]e question whether *Devlin's* holding applies to opt-out class actions certified under Rule 23(b)(3).
> ....
> Though we believe the limited reading of *Devlin* has considerable merit, we need not finally resolve the debate because, as it happens, Henderson's case has become moot....

In re General American Life Ins. Co. Sales Practices Litig. v. General American Life Ins. Co., 302 F.3d 799, 800 (8th Cir. Sept. 5, 2002).

> Because the Objectors would not qualify as parties even under the most permissive possible reading of *Devlin*, we decline to determine whether and when *Devlin* may apply outside of the mandatory class action context or to pass judgment on *Karaha Bodas* and *Plain.*
> ....
> We need not determine the precise breadth of *Devlin* to see that the Objectors clearly stretch it too far.

AAL High Yield Bond Fund a series of Delaware Group Income Funds, etc., v. Banc of America Sec. LLC, etc., et al., 361 F.3d 1305, 1311 (11th Cir. Mar. 2, 2004).

No court has ever rejected the holding in *Devlin* for that or any other reason. No court has refused to apply it to a class action in which class members were permitted to opt out.

> Churchill urges that we read *Devlin* narrowly. There, the Court relied on the fact that Devlin was unable to opt out of the *Rule 23(b)(1)* class. Here, by contrast, the Beckwith objectors may exclude themselves from the settlement and thus preserve their right to seek relief from GE.... [T]he

> settlement will effectively bind the objectors. They therefore occupy precisely the status the *Devlin* Court sought to protect. *See [Devlin, 536 U.S. at 10]* ("What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing.").

Churchill Village, L.L.C. v. General Electric, et al., 361 F.3d 566, 572 (9th Cir., San Francisco, Cal., Mar. 16, 2004), *citing Devlin, supra,* 536 U.S. at 10 (emphasis added).

V.

EVEN IF THIS COURT REAFFIRMS *EGGERT*, THE COURT OF APPEAL'S DISMISSAL OF CLASS MEMBER-APPELLANT'S APPEAL WAS IMPROPER

Even if this Court were to hold that intervention is a necessary prerequisite for unnamed class members in class actions to secure appellate standing, the court of appeal's decision to dismiss this appeal for lack of standing was improper under the unique facts and circumstances of this case.

A. Class Member-Appellant Took Steps to Become a Party.

Class Counsel's assertions:

> Petitioner did not take any steps to become a party to the record.

(ABM at 9), is untrue.

Petitioner remained on the sidelines throughout the litigation,

(ABM at 17), is untrue.

Class Member-Appellant's counsel followed the instructions that the parties gave Ms. Muller in their notice.

> If you do not request exclusion, you may enter an appearance in the matter through counsel, but are not required to do so.

(The full long-form Notice of Pendency of Class Action can be referenced at Appellant's Appendix at 2.)

Those steps created sufficient on-the-record presence to be entitled to appellate party status. The Notice of Pendency did not identify any further conduct as required to fully participate in the litigation.

B. The Legal Precedent at the Time of the Underlying Trial Court Case Did Not Require Unnamed Class Members to Intervene.

A Fourth Appellate District Court decision prior to *Restoration Hardware* had no intervention requirement. *Consumer Defense Group v. Rental Housing Industry Members,* 137 Cal.App.4th 1185 [40 Cal.Rptr.3d 832] (4th App. Dist., Div. 3, Mar. 24, 2006), justifies this appeal moving forward. This prior decision of the Fourth Appellate District establishes the reasonableness of Class Member-Appellant's belief that intervention was not required.

Special circumstances warrant that this appeal be permitted to continue forward. Class Member-Appellant's actions were sufficient under the rules that existed at the time to permit this appeal to continue forward. The *Restoration Hardware* court reversed the rulings of eight different appellate decisions over 42 years, including its own Fourth District (albeit from a different division), and created new procedural hurdles for unnamed class members. To dismiss the appeal as a result of an unforeseeable, abrupt, and radical shift in the law would be inequitable.

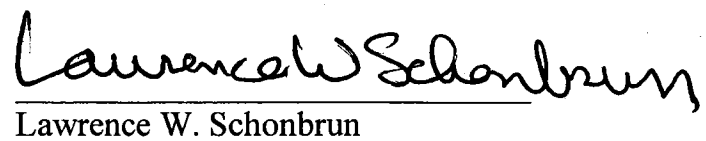
CONCLUSION

The Answer Brief on the Merits fails to present any significant arguments for requiring unnamed class members to intervene in order to have standing to appeal. *Eggert* should be overruled in favor of the *Trotsky* and *Devlin* lines of cases.

As a point of personal observation, because Class Counsel have personally attacked Class Member-Appellant's counsel, the question arises: what does Class Counsel think of practice before the California Supreme Court that they would include the kinds of arguments they have made in their Answer? Admittedly, Class Member-Appellant's counsel's umbrage may be the result of having been taught the practice of law many years ago according to mores that may no longer be relevant to modern practice. On the other hand, if Class Counsel's conduct is inappropriate, this Court should indicate its strong displeasure as such tactics are, in this counsel's opinion, unworthy of the profession of law and unworthy of this Honorable Court.

Dated: February 28, 2017

Respectfully submitted,

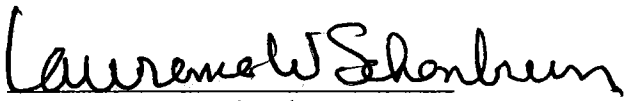


Lawrence W. Schonbrun
Attorney for Plaintiff Class Member and
Appellant Petitioner Francesca Muller

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 Francesca Muller's Reply Brief on the Merits contains 8,390 words of proportionally spaced Times New Roman 13-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 Reply Brief on the Merits.

Dated: February 28, 2017



Lawrence W. Schonbrun

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 February 28, 2017, I caused to be served a copy of the following document:

APPELLANT FRANCESCA MULLER'S
REPLY BRIEF ON THE MERITS

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

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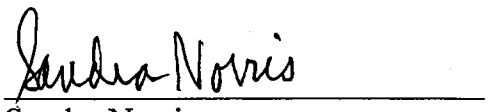
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 28, 2017, at Berkeley, California.



Sandra Norris