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.

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 ANSWER TO *AMICUS CURIAE* BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA

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INTRODUCTION

The *amicus curiae* brief of Consumer Attorneys of California (hereinafter "CAOC"), formerly the California Trial Lawyers Association:

(a) misstates current California law on class member-appellate standing;

(b) misstates Class Member-Appellant Muller's primary argument against the intervention requirement imposed by the *Restoration Hardware* decision[1];

(c) offers little convincing argument to support its position that this Court should jettison the present *de facto* legal requirements for class members' appellate standing, which have been in effect since 1975. CAOC argues instead in favor of an intervention requirement based on *Eggert v. Pacific States Savings and Loan Co., et al.*, 20 Cal.2d 199 (Apr. 21, 1942), a case that was decided 75 years ago and which has been all but ignored[2] by appellate courts throughout this state for the past 42 years.

What is true, however, is that CAOC expends the bulk of its brief discussing appeals in federal class action litigation (see *Amicus Curiae* Brief of Consumer Attorneys of California (hereinafter "CAOC Br.," at 3-9). CAOC provides no citation to legal authority that suggests a problem with the last 42 years of California class action appellate practice – a practice under which class members have not been required to intervene to obtain appellate standing.

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[1] *Hernandez, et al., Pls. and Resp'ts; Francesca Muller, Pl. and Appellant v. Restoration Hardware, Inc., Def. and Resp't*, 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).

[2] With one exception, see page 2, *infra*, besides the instant case.

DISCUSSION

I.

AMICUS CAOC MISSTATES CURRENT CALIFORNIA LAW ON CLASS MEMBER-APPELLATE STANDING

A. *Eggert* Is Not Applicable Precedent in Any Appellate District Other Than *Restoration Hardware's* Fourth Appellate District, Division One, and the Second Appellate District, Division Seven.

1. *Amicus* CAOC's statement:

> If objectors in California want to seek review, they must obtain party status under longstanding statutes and California Supreme Court precedent. (CAOC Br. 2),

is factually incorrect. While it is true that "California has developed its own body of class action law" (CAOC Br. 11), that development long ago left *Eggert v. Pacific States Savings and Loan Co., supra,* a 75-year-old-case, as an historic relic. In reality, *Eggert* is not "the modern seminal decision" as CAOC claim (CAOC Br. 9). The "party of record" requirement (CAOC Br. 9) is satisfied without intervention.

2. Long-standing California practice is not the 75-year-old decision in *Eggert*, but the 42-year-old 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). The CAOC brief clings to the fiction that *Eggert* is prevailing precedent, wholly disregarding eight appellate cases dating back to 1975 that have superseded *Eggert.*

Prior to the instant case, *Eggert* had been entirely ignored in the period of modern 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). (See Appellant's

Opening Brief on the Merits (hereinafter "OBM") at 15, 23, and her Reply Brief on the Merits (hereinafter "RBM") at 6.)

3. California case law recognizes that California rules (see California Rules of Court (C.R.C.), Rule 3.769(f)) require that an unnamed class member who files a written objection and attends the fairness hearing at which those objections are evaluated by the court and counsel has satisfied appellate standing requirements.

> At the threshold we reject Whole Foods' contention Giampietro lacks standing to appeal the court's order denying his motion for attorney fees because he was not a named party in Consumer Cause's lawsuit. A class member who appears at a fairness hearing and objects to a settlement affecting that class member has standing to appeal an adverse decision notwithstanding the fact that the member did not formally intervene in the action.
>
> (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc.*, 127 Cal.App.4th 387, 395 [25 Cal.Rptr.3d 514] (2d App. Dist. Mar. 7, 2005) (emphasis added).

Thusly, CAOC is incorrect in asserting that:

> [F]iling an objection is *not* the procedural equivalent of intervening.
> (CAOC Br. 11.)

CAOC asserts a jurisprudence (CAOC Br. 2) that has been applied in a reported case only once since 1975 – and that was 16 years ago.

B. In Point of Fact, *Eggert* Was Not Even Precedent in the Fourth Appellate District Prior to *Restoration Hardware.*

Prior to the *Restoration Hardware* decision, the operative precedent in the Fourth Appellate District was *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) (see OBM 16, 20-22). There is no basis for CAOC to claim that *Eggert*'s so-called "party of record" requirement (CAOC Br. 9) was an actual requirement, even in the Fourth District!

C. CAOC Ignores Eight Appellate Decisions Supporting Class Member Muller's Position.

CAOC intentionally (it cannot be argued otherwise[3]) ignores the fact that eight different California Courts of Appeal over the past 42 years have endorsed a rule of appellate standing that does not require intervention by an unnamed class member in a class action.

CAOC fails to acknowledge even the existence[4] of these eight California appellate rulings, which constitute the current jurisprudence on absent class members' standing to appeal. That jurisprudence rejects an intervention requirement:

> *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);
>
> *Simons v. Horowitz, et al.*, 151 Cal.App.3d 834, [199 Cal.Rptr. 134] (1st App. Dist., Div. 3, Feb. 7, 1984);
>
> *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, [269 Cal.Rptr. 844] (1st App. Dist., Div. 2, May 25, 1990);
>
> *Wershba v. Apple Computer*, 91 Cal.App.4th 224, [110 Cal.Rptr.2d 145] (6th App. Dist. July 31, 2001);
>
> *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc.*, 127 Cal.App.4th 387, [25 Cal.Rptr.3d 514] (2d App. Dist. Mar. 7, 2005);

---

[3] See Appellant's OBM 16-23 and her RBM 7.

[4] A legitimate friend of the court does not ignore cases cited by appellant's counsel.

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);

Chavez v. Netflix, Inc., 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413] (1st App. Dist., Div. 1, Apr. 21, 2008);

Roos v. Honeywell International, Inc., 241 Cal.App.4th 1472 [194 Cal.Rptr.3d 735] (1st App. Dist., Div. 1, Nov. 10, 2015).

Class Member Muller provided an extensive discussion of *Trotsky, supra,* and the above-cited cases in her Opening Brief on the Merits at 15-23, and her Reply Brief on the Merits at 6-7. Her reply brief also provides a thorough analysis of the flaws in *Restoration Hardware's* rejection of *Trotsky* (RBM 8-9).

D. CAOC Ignores the Case Law on California Code of Civil Procedure § 902 That Supports Class Member Muller's Position.

Completing its comprehensive misstatement of California law, CAOC's extended discourse on the statutory right to appeal (CAOC Br. 8-10; California Code of Civil Procedure § 902) fails to reference the exception to Code of Civil Procedure § 902 found in *Marsh v. Mountain Zephyr, Inc.*, 43 Cal.App.4th 289 [50 Cal.Rptr.2d 493] (4th App. Dist., Div. 1, Mar. 6, 1996). The *Marsh* exception is precedent precisely on point here (see Appellant's OBM 29):

> One exception to the "party of record" requirement exists in cases where a judgment or order has a res judicata effect on a nonparty. "A person who would be bound by the doctrine of res judicata, whether or not a party of record, is ... [entitled] to appeal."

Marsh, supra, 43 Cal.App.4th at 295 (citations omitted). *Accord, Life v. County of Los Angeles*, 218 Cal.App.3d 1287, 1292 [267 Cal.Rptr. 557] (2d App. Dist., Div. 3, Mar. 20, 1990); *Leoke v. County of San Bernardino*, 249 Cal.App.2d 767, 771[57 Cal.Rptr. 770] (4th App. Dist., Div. 2, Mar. 29, 1967); and *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of*

America, et al., 141 Cal.App.4th 46, 58 [45 Cal.Rptr.3d 647] (2d App. Dist., Div. 8, July 6, 2006).

If that were not enough, CAOC seeks to overturn *Marsh*, implicitly recognizing that its holding contradicts CAOC's argument on appellate standing:

> At any rate, this Court should not alter its reading of section 902 just for class actions [as *Marsh* does].
> (CAOC Br. 11.)

II.

AMICUS CAOC MISSTATES CLASS MEMBER MULLER'S ARGUMENTS

A. CAOC Mischaracterizes Class Member Muller's Primary Argument against the *Restoration Hardware* Intervention Mandate.

Amicus CAOC asserts throughout its brief that Class Member Muller's main argument is:

> *Eggert* should be jettisoned in favor of federal practice....
> (CAOC Br. 3);
>
> In [Muller's] urging that California align with federal law on the right to appeal....
> (CAOC Br. 8);
>
> Adopting the federal approach to appeals by absent class members....
> (CAOC Br. 12).

This is not true.

Class Member Muller's main position is that over the last 42 years since *Trotsky, supra,* eight different courts of appeal in this state have held that an unnamed class member in a class action obtains appellate standing by (1) filing a written objection to a proposed request for approval of a

class action settlement and/or a request for an attorneys' fee award and (2) appearing at the fairness hearing to defend the objection.

Rather than seeking to align California practice with federal practice, she instead seeks to align *Eggert, supra,* and *Restoration Hardware, supra,* with the last 42 years of California practice, commencing with *Trotsky, supra.* Class Member Muller merely points out that in addition to this long-standing California practice, federal practice for the last 15 years adheres to the same rule.

B. CAOC Falsely Asserts That Class Member Muller's Position Contradicts California Code of Civil Procedure § 902.

1. Class Member Muller does not, contrary to CAOC's claim, seek to nullify section 902 of the California Code of Civil Procedure:

> Muller identifies no compelling reason to disregard section 902....
> (CAOC Br. 10; emphasis added.)

Code of Civil Procedure § 902 says that a class member must be a party:

> Any party aggrieved may appeal in the cases prescribed in this title.

Eight California courts of appeal have held that filing an objection and appearing at a fairness hearing satisfies that "party of record" (CAOC Br. 11) requirement. Class Member Muller's arguments have been fully consistent with that case law. (OBM 16-23; RBM 7.)

2. Class Member Muller's argument is that because unnamed class members in a class action are "bound by the judgment" (Appellant's OBM 7, Statement of Facts), they are "always aggrieved." Thusly, the rules under mandatory intervention are always applicable to an unnamed class member in a class action. (See Code of Civil Procedure § 387(b).)

CAOC's argument that:

> Adopting the federal approach to appeals by absent class members, moreover, would disregard California's distinct statutory framework governing the right to appeal.
> (CAOC Br. 12),

is legally incorrect.

III.

CAOC'S EXTENDED DISCUSSION OF FEDERAL PRACTICE IS IRRELEVANT TO THE INTERVENTION ISSUE UNDER REVIEW

A. CAOC Acknowledges That Federal Practice Does Not Require Intervention for Unnamed Class Members in Order to Obtain Appellate Standing.

> [A] terse written objection - one filing, not even an appearance by counsel - suffices to permit an appeal under *Devlin.*
> (CAOC at 4.)

B. CAOC Does Not Identify Any Effort to Change Federal Practice As Regards Intervention.

It should most importantly be pointed out that CAOC demonstrates absolutely no intention by the Advisory Committee of Rules and Civil Procedure that the federal practice enunciated in *Devlin v. Scardelletti*, 536 U.S. 1 (June 10, 2002) – holding that intervention is not necessary to obtain appellate standing – should be changed in any way. It would therefore be fair to conclude that the federal court system has not determined that an intervention requirement should be imposed. CAOC's remaining discussion of federal practice is entirely irrelevant to the issue before this Court.

C. The So-Called "Professional Objector Problem" Is Irrelevant to the Intervention Issue Here under Review.

The so-called professional objector problem is not being addressed in the federal courts by requiring intervention. It is being addressed without modifying the *Devlin, supra,* holding. The federal courts have not moved to change the rule that makes intervention unnecessary for class members to establish appellate standing. This is in spite of *amicus* CAOC's accusation that "Objectors have used the heft *Devlin* accords to demand payoffs to dismiss their appeals." (CAOC Br. 4.)

The proposed changes by the Advisory Committee on Rules of Civil Procedure that CAOC references on page 7 of its *amicus* brief have nothing to do with an intervention requirement as CAOC would impose on California. Those changes would have no effect on current federal policy regarding the nonrequirement of intervention.

One proposed rule change, New Rule 23(e)(5)(B), would require judicial approval of any payments made to objectors' counsel to withdraw an objection or to drop an appeal:

> New Rule 23(e)(5)(B) will require court approval of any payments to objectors or their counsel:
>
> > *Court Approval Required For Payment to an Objector or Objector's Counsel.* Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with: (i) forgoing or withdrawing an objection, or (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(CAOC Br. 7, *citing* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, available at *www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment* (found under August Publication, Civil Rule 23(e)(5)(B), at 216.)

A second proposed change, New Rule 23(e)(5)(A), will require that:

> "The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection."

(CAOC Br. 7, *citing* Preliminary Draft of Proposed Amendments to the Federal Rules, etc., *ibid.* at 215-16.)

Although CAOC believes that both proposed rule changes "are a systemic reaction to the detrimental consequences of the easy appeal regime under *Devlin*" (CAOC Br. 8), neither of them have anything to do with imposing an intervention requirement for class members' standing to appeal. CAOC's simple but deceptive claim to support its position of an intervention requirement does so by misappropriating *Devlin*:

> The federal experience under *Devlin* shows that objector participation should be subject to reasonable regulation and judicial scrutiny.
> (CAOC Br. 8.)

Despite the primary focus of CAOC's *amicus* brief (pp. 3 through 8) on the federal response to professional objectors, nothing in the proposed federal changes supports CAOC's call for imposing a requirement of intervention in the federal courts, much less California. On the contrary, the discussion of federal practice clearly demonstrates that intervention has been rejected as "reasonable regulation" or necessary "judicial scrutiny."

CAOC attempts to paper over the absence of a federal move towards intervention:

> Implementing *comparable requirements* in California could be facilitated case by case through the procedural vehicle of intervention.
> (CAOC Br. 8; italics added),

by resorting to a *non sequitur*. Intervention is not a "comparable requirement" to court approval of the withdrawal of objections.

If indeed CAOC thinks that the federal system has successfully addressed the objector abuse issue through "reasonable regulation" and "judicial scrutiny" (CAOC Br. 8), then it should go the California Legislature and lobby to have laws in this state implemented that are similar to the proposed Rule 23(e)(5)(B) and Rule 23(e)(5)(A).

IV.

CAOC'S PUBLIC POLICY ARGUMENTS IN SUPPORT OF AN INTERVENTION REQUIREMENT ARE WEAK AT BEST AND MUST BE SEEN AS CONTAMINATED BY SELF-INTEREST

A. Requiring Intervention by a Class Member/Objector Is Duplicative and Redundant.

> A complaint-in-intervention is a vehicle to outline objections with some precision that aids both the judge and the parties. (CAOC Br. 10.)

1. California Rules of Court Rule 3.769(f) addresses the issue.

In class actions, the outlining of objections is clearly accomplished by the filing of a written objection. Rule 3.769(f) of the California Rules of Court requires a class member to file a written objection and attend the court hearing to explain and defend the objection. CAOC offers no plausible explanation of how complaints in intervention,

> "[S]etting forth the grounds upon which the intervention rests...."
> (CAOC Br. 10; *citing* C.C.P. § 387, subd. (a)),

offer anything more to courts to "evaluate objections" (CAOC Br. 2) and to highlight "baseless objections" (CAOC Br. 4) than already exists.

2. Intervention offers nothing but unnecessary make-work.

The intervention process will, as Class Member Muller has previously pointed out (OBM 38-40), merely make more work for

objectors' counsel, for defendants' counsel, for class counsel, for trial court judges, and likely for appellate court judges as well.

3. Intervention is not an answer to regulate the so-called "professional objector."

The Northern District of Ohio, in *In re Polyurethane Foam Antitrust Litig.*, 178 F.Supp.3d 635 (N.D. Ohio, Western Div., Apr. 13, 2016), used the term "professional objector" to describe those who abuse the class action objection process. How ironic that the very characteristic of the so-called "professional" objector connotes the possession of a skill set needed to prepare necessary court motions! An intervention requirement is not going to deter lawyers sophisticated enough to file an intelligent objection.

Furthermore, requiring intervention will do little or nothing to protect against what CAOC describes as the bad faith of so-called "professional objectors." (CAOC 4.) In fact, CAOC makes no argument and introduces no evidence that professional objectors would in any way be impeded by a requirement of filing a pleading in intervention.

B. CAOC's Arguments in Favor of Intervention by a Class Member/Objector are Vague and Unsubstantiated.

CAOC makes a series of "seat-of-their-pants" arguments in favor of an intervention requirement that are vague and unsubstantiated. A close analysis of CAOC's arguments reveals a total lack of evidentiary support:

1. "In too many cases since *Devlin*...." (CAOC Br. 3.)

CAOC provides no information about what "too many" cases means in actual numbers.

2. "[O]ften the objections have nothing to do with the facts or legal principles at hand...." (CAOC Br. 3.)

Again, there are thousands of class actions filed each year in California. CAOC provides no information as to how often this asserted problem arises.

3. "[T]o weed out baseless objections." (CAOC Br. 4.)

CAOC provides no evidence on the problem of baseless objection. It also fails to show how an intervention process would be any more effective at weeding out baseless objections than the existing process of trial court review of C.R.C. Rule 3.769(f) objections. Courts can inquire at the fairness hearing if more information is needed.

4. "[P]atently frivolous" objections "having no grounding in the law" (CAOC Br. 5) during the post-*Trotsky* period.

CAOC again provides no evidence to support the argument that such objections are a significant and unaddressed problem in the class action appellate process in California.

5. "The increasing difficulty in bringing class actions is readily apparent." (CAOC Br. 6.)

Again, CAOC provides no information to support this assertion. For example, nearly 500 class action complaints alleging Volkswagen pollution test fraud[5] demonstrates that there is no difficulty in bringing class actions.

---

[5] "More than 490 lawsuits have been filed, most as potential class actions, since the Environmental Protection Agency disclosed in September that Volkswagen installed software in seemingly environmentally friendly diesel vehicles that cheated emissions tests." Sara Randazzo, *U.S. Suits over Volkswagen Emissions to Be Weighed in San Francisco*, THE WALL STREET JOURNAL (Dec. 8, 2015).

6. "[C]lass actions are inherently high risk." (CAOC Br. 6.)

Again, CAOC does not state what risk it is talking about or what "high" means. It supplies no evidence as to the degree of risk faced by attorneys who file class actions.

7. "[E]normous costs." (CAOC Br. 7.)

Again, CAOC provides no evidence to support its use of the term "enormous."

8. "[N]o assurance of recovery" (CAOC Br. 7.)

CAOC provides no evidence about the likelihood of recoveries in class action litigation. Indeed, it is an incontrovertible fact that almost no class actions go to trial.

9. "Virtually every move by class counsel is under the microscope." (CAOC 6.)

(a) CAOC provides no information about what this means.

(b) CAOC presumably also seeks to imply that objectors are unnecessary to the class action process, again without submitting any corroborating evidence.

10. "[J]udges are parsing class counsel's submissions." (CAOC 7.)

CAOC provides no evidence to support this assertion other than citing to one federal case from 2016. One case is hardly sufficient to support its claim, much less justify an intervention requirement. Again, this assertion seems to seek to create the impression, again without support, that objectors are unnecessary to the class action process.

11. "[D]elay distribution" (CAOC Br. 4.)

CAOC provides no evidence of the actual experience of how appeals affect class action settlement distributions, and whether this concern raises an important public policy issue.

It should be noted that the appeal in this case did not delay the distribution of settlement benefits nor the distribution of attorneys' fees to Class Counsel! In cases where only the attorneys' fee is being appealed, there is no necessary delay of settlement benefits to class members. It is only when Class Counsel self-servingly structure a settlement to put the class's recovery on hold if there is an appeal of the fee award that this problem even arises. Class Counsel do this to pressure the court to approve their fee request, but delay need not follow from an appeal.

C. Neither the California nor the Federal Judiciary Recognizes a Problem with Class Action Appeals That Requires Intervention.

1. CAOC confirms that objector appeals are rare:

> *Knisley* was a rare objector appeal that went through to an opinion.
> (CAOC Br. 6.)

2. CAOC confirms that few appeals get to the briefing stage:

> The appeal is more often dismissed without any briefing.
> (CAOC Br. 2.)

The obvious implication of these admissions is that objectors' appeals do not place a burden on appellate courts. It is noteworthy that although CAOC goes to great lengths to claim that the lack of an intervention requirement is causing problems, the problems could not be serious as CAOC has made no effort over the last 42 years to correct this purported problem.

3. CAOC (perhaps inadvertently) confirms that a significant number of objector appeals are beneficial, referencing "three occasions" on which appeals were successful. (CAOC Br. 6.)

Working out CAOC's arithmetic, roughly 10% of cases decided on the merits result in decisions favoring the objector/appellant.

That figure in itself indicates that a significant number of objections are not baseless and furthermore provides no support for an argument that even unsuccessful appeals are frivolous.

D. CAOC Is a Trade Group Whose Primary Concern Is Promoting Its Members' Financial Interests.

1. CAOC acknowledges the reasonableness of arguments against intervention:

> Although there are reasonable contentions against intervention, they are outweighed by the factors favoring it.
> (CAOC Br. 11.)

2. CAOC acknowledges that a requirement for intervention can "chill" (CAOC Br. 6) objectors' appeals, although they self-servingly assert to the Court that that is not their intention. But what is more important, CAOC's intention or the effect of such a requirement?

CAOC, in effect, concedes that objector appeals are a business problem rather than a legal problem. CAOC seeks help from this Court in disadvantaging those seeking court review of plaintiffs' class action lawyers' settlements and/or attorneys' fee awards.

CONCLUSION

Amicus CAOC comes before the Court not as a neutral serving the public interest but instead as an advocate for the financial interests of plaintiffs' class action attorneys.

CAOC's interest in protecting so-called "leverage" (CAOC 4) is hypocritical. The existence of leverage that plaintiffs' class action lawyers use to argue against objectors generally is the lifeblood of their class action practice:

> [T]he settlement is substantively troubling. Crawford [the plaintiff and class representative] and his attorney were paid handsomely to go away; the other class members received nothing (not even any value from the $5,500 "donation") and lost the right to pursue class relief.

Crawford v. Equifax Check Svcs., Inc., 201 F.3d 877, 882 (7th Cir. Jan. 3, 2000 (emphsis added).

Improving the financial margins of overpaid[6] plaintiffs' class action lawyers is hardly a fitting role for the California Supreme Court. Class Member Muller respectfully suggests that this Court should find nothing persuasive in CAOC's *amicus* brief.

Dated: May 10, 2017

Respectfully submitted,

Lawrence W. Schonbrun

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

---

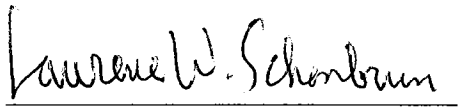
[6] Alex Beam, *Greed on Trial*, The Atlantic (June 2004), comments by humorist Dave Barry on the tobacco litigation:

> "[The states] are distributing the money as follows: (1) Legal fees; (2) Money for attorneys; (3) A whole bunch of new programs that have absolutely nothing to do with helping smokers stop smoking; and (4) Payments to law firms. Of course, not all the anti-tobacco settlement is being spent this way. A lot of it also goes to lawyers."

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 Answer to *Amicus* Curiae Brief of Consumer Attorneys of California contains 4,096 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: May 10, 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 May 10, 2017, I caused to be served a copy of the following document:

APPELLANT FRANCESCA MULLER'S ANSWER TO *AMICUS* CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA

__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 May 10, 2017, at Berkeley, California.

Sandra Norris

Sandra Norris