No. S233983

IN THE
SUPREME COURT OF CALIFORNIA

MIKE HERNANDEZ, *et al.*,

Plaintiffs and Respondents,

FRANCESCA MULLER,

Plaintiff and Appellant;

v.

RESTORATION HARDWARE, INC.,

Defendant and Respondent.

On Review from Court of Appeal
Fourth Appellate District, Division One, No. D067091
Appeal from the Superior Court of San Diego County
The Honorable William S. Dato
Super. Ct. No. 37-2008-00094395-CU-BT-CTL

APPLICATION TO FILE AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA SUPPORTING PLAINTIFFS-RESPONDENTS

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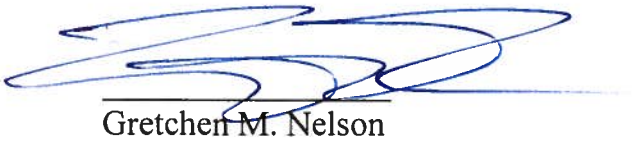
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Under California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization with no shareholders. Amicus curiae and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that amicus curiae and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

DATED: March 30, 2017



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MISCELLANEOUS

I. APPLICATION FOR PERMISSION TO FILE

Amicus curiae Consumer Attorneys of California (CAOC) respectfully seeks permission to file the accompanying brief as friend of the Court. (Cal. Rules of Court, rule 8.520(f)(1).)

Founded in 1962, CAOC is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. As pertinent to this case, its members represent individuals and entities in class actions. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees, and injured victims in both the courts and the Legislature.

CAOC has participated as amicus curiae in precedent-setting decisions shaping California class action procedure. (See, e.g., *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480; *Duran v. U.S. Bank* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.) This Court has agreed with CAOC on the need to ensure the "effectiveness of class actions" to "provide relief in consumer protection cases." (*Pioneer Electronics (USA), Inc. v. Superior Court* (2008) 40 Cal.4th 360, 374.)

CAOC is familiar with the parties' briefing. Here, CAOC seeks to assist the Court "by broadening its perspective" on the context bounding the issue presented. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177, citation omitted.)[1]

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[1] No party or its counsel authored any part of CAOC's amicus curiae brief and, except for CAOC and its counsel here, no one made a monetary or other contribution to fund its preparation or submission. (Cal. Rules of Court, rule 8.520(f)(4).)

II. INTRODUCTION

The issue on review – whether unnamed class members must intervene to have standing to appeal – is narrow on its face but arises in an important context with significant practical consequences. CAOC files as amicus curiae to make two points.

First, class actions function best when all persons and entities with an interest in the proceeding have not just rights but responsibilities. This is particularly so as to appellate rights. Since 2002, the right to appeal in federal class actions without intervening has severed objectors' rights from responsibilities to the judicial system. More than anecdotally, the federal right to appeal has been misused for improper purposes, such as demanding payoffs to dismiss appeals that hold up settlement distributions to an entire class that has not objected. Only a small percentage of appealing objectors litigate the appeal to a final decision. The appeal is more often dismissed, without any briefing. The federal approach provides excessive leverage to appealing objectors and has proven to be unsound. Given the federal experience over the past fifteen years, California law should not be recrafted to follow it. In fact, federal law is in flux. Fed. R. Civ. P. 23 is currently being amended to curtail abusive objector practices.

Second, intervention is a suitable procedural device to evaluate objections and, whatever the law in other jurisdictions, is mandated by the Code of Civil Procedure. Although the objector here urges the Court to follow federal law, California appellate rights arise solely by statute. This is a key distinction from both federal and trial practice. Any right to appeal is governed by different legal norms than objecting before final judgment. If objectors in California want to seek review, they must obtain party status under longstanding statutes and California Supreme Court precedent.

III. ARGUMENT

A. Experience under Recent Federal Law, Not Requiring Intervention to Appeal, Has Shown that Objectors Must Be Subject to Regulation

Unnamed class member Francesca Muller challenges the ongoing viability of *Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199 (*Eggert*). The Court of Appeal properly followed *Eggert*, which required her to become a party of record to appeal. Muller says *Eggert* should be jettisoned in favor of federal practice, not requiring intervention, established in *Devlin v. Scardelletti* (2002) 536 U.S. 1 (*Devlin*). For several reasons, however, this invitation should be declined.[2]

Devlin clarified appellate rights for federal class actions under Rule 23. Before deciding whether to abandon *Eggert*, this Court therefore has the benefit of fifteen years of federal practice under *Devlin*.

The record is mixed at best. To be sure, when their interests are adjudicated, unnamed class members possess important constitutional and procedural rights. They have the right to notice and to be heard at the trial level. But at the appellate level, their participation has a dark underside that has received less attention in the appellate courts (because, as discussed below, few objector appeals reach a decision on the merits).

In too many cases since *Devlin*, objectors have lodged conclusory or boilerplate objections of no value. Often the objections have nothing to do with the facts or legal principles at hand; the objector makes no effort to become acquainted with the case. Generic or ill-informed protests do not assist the judge in deciding, most frequently, whether to approve a

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[2] Likewise, Muller's invitation to revisit the facts stated by the Court of Appeal falters for not raising those challenges in a petition for rehearing. (Cal. Rules of Court, rule 8.500(c)(2).)

settlement or fee award or, for that matter, aid the parties in possibly improving their proposed resolution. Instead, this throws a wrench into the process that only slows things down to weed out baseless objections. (See, e.g., *Hartless v. Clorox Co.* (S.D. Cal. 2011) 273 F.R.D. 630, 642.)

More vexing for the rest of the class, even if rejected, a terse written objection – one filing, not even an appearance by counsel – suffices to permit an appeal under *Devlin*. A notice of appeal is a simple document but has weighty implications for jurisdiction and finality. An appeal by one objector is enough to delay distribution of an approved settlement to a class of thousands or more awaiting its relief.

Time has shown, CAOC submits, that the federal approach is too lax. Without greater accountability than *Devlin* provides, simply by filing an objection and appealing, objecting class members wield disproportionate and even damaging leverage in a class action. This throws out of sync an interconnected web of rights and obligations of many parties seeking to litigate or resolve a class action (as the Court of Appeal phrased it, the manageability of class proceedings).

This disconnect between leverage and responsibility has led to not just shoddy objections but outright abuses. Objectors have used the heft *Devlin* accords to demand payoffs to dismiss their appeals. District judges, on the front lines of class action litigation, have witnessed what goes on and bluntly condemned it:

> - "In sum, to varying degrees, each Objector has shown bad faith and vexatious conduct, both in prior cases and in this action, in the pursuit of a payoff. Their conduct here resembles scavenger ants on a jelly roll, scrambling to extort money from the approved settlements."[3]

[3] *In re Polyurethane Foam Antitrust Litigation* (N.D. Ohio 2016) 178 F.Supp.3d 635, 640 (surveying case law and imposing appeal bond).

- "[Objectors'] goal was, and is, to hijack as many dollars for themselves as they can wrest from a negotiated settlement. Objectors' eight-page-long, two-week-late pleading presented no facts, offered no law, and raised no argument upon which the Court relied in its deliberation or ruling concerning class counsel's motion for fees."[4]

- "These are the opportunistic objectors. Although they contribute nothing to the class, they object to the settlement, thereby obstructing payment to lead counsel or the class in the hope that lead plaintiff will pay them to go away."[5]

As one decision stated as to unfounded objections even before *Devlin*, "this Court is the 'guardian' of the class" but "also the guardian of the judicial system's integrity." (*Shaw v. Toshiba America Information Systems, Inc.* (E.D. Tex. 2000) 91 F.Supp.2d 942, 975.)

The ease with which absent class members may appeal – there is little downside or effort required under *Devlin* – has opened the door to the patently frivolous. If a payoff is not the focus, many objectors do not seek to improve the terms for the class, but, rather, to push their own policy agenda having no grounding in the law. The Ninth Circuit rejected one objection with this explanation: "[Appellant] asks us to 'throw the moneylenders out of the Temple, by reining in class action plaintiff's attorneys and protecting their clients, the actual class members.' Were we to embark on a quest to reform securities litigation, we doubt that our approach would involve licensing self-appointed Samaritans to rove the legal campagna, appealing fee awards that no party with an actual stake

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[4] *In re UnitedHealth Group Inc. PSLRA Litigation* (D. Minn. 2009) 643 F.Supp.2d 1107, 1109.

[5] *In re Cardinal Health, Inc. Securities Litigation* (S.D. Ohio 2008) 550 F.Supp.2d 751, 754.

in the outcome cares to dispute." (*Knisley v. Network Associates, Inc.* (9th Cir. 2002) 312 F.3d 1123, 1128 (citation omitted).) The Ninth Circuit added: "[W]e deal in cases, not crusades." (*Ibid.*)

Knisley was a rare objector appeal that went through to an opinion. In 2013, the Federal Judicial Center examined objector appeals over a five-year-period from class settlement approvals in several appellate courts, including the neighboring Ninth Circuit. The study found that during this time, only 13% of terminated objector appeals in the Ninth Circuit were decided on the merits.[6] "Out of a combined total of 126 terminated objector appeals identified in the study, the objectors or appellants were successful in their appeals on only three occasions."[7]

CAOC does not seek to chill or curtail appellate rights, but only to suggest a more even balance than *Devlin* has engendered. The increasing difficulty of bringing class actions is readily apparent. As federal law has stiffened against consumers over the past decade, nothing is easy from the plaintiff's side in a class action – whether defeating an arbitration clause, class certification, preliminary approval of a settlement, the form or extent of notice, final approval, or the exceptional trial. Virtually every move by class counsel is under the microscope of not just absent class members but the legal press and, most significantly, the trial court fulfilling its active role in managing a class action.

Although some class suits are more risky than others, class actions are inherently high risk. The opposition is typically first-rate defense

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[6] Study of Class Action Objector Appeals in the Second, Seventh, and Ninth Circuit Courts of Appeals, http://www.fjc.gov/public/pdf.nsf/lookup/class-action-objector-appeals-leary-fjc-2013.pdf/$file/class-action-objector-appeals-leary-fjc-2013.pdf (Executive Summary) (last visited Mar. 22, 2017).

[7] *Id.*

counsel, the litigation requires advancing enormous costs with no assurance of recovery, and, as in the instant case, the suit may drag out for years if anything is recovered at all. Class counsel's professional discretion, which once gave rise to academic criticism grounded on agency-based theories, has incrementally but unmistakably ebbed. In contrast to non-representative actions that can be resolved privately, judges are parsing class counsel's submissions as closely as ever. (See, e.g., *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1113 [denying preliminary approval despite "sizeable settlement sum" and "significant risk that drivers face in pursuing this litigation"].)

Under *Devlin*, the same cannot be said of objector participation, but reforms are in the works to curtail misuse of the right to 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.[8]

New Rule 23(e)(5)(A) will prohibit boilerplate objections providing no assistance: "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."[9]

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[8] *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, available at http://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_published_for_public_comment_0.pdf (PDF, p. 216) (last visited Mar. 22, 2017).

[9] *Id.* at pp. 215-216.

These additions are a systemic reaction to the detrimental consequences of the easy-appeal regime under *Devlin*. As discussed below, implementing comparable requirements in California could be facilitated case by case through the procedural vehicle of intervention.

Again, active participation by unnamed class members may contribute to the mix and, given that their rights are at stake, is wholly appropriate as the trial proceedings unfold. The question is how this occurs. The federal experience under *Devlin* shows that objector participation should be subject to reasonable regulation and judicial scrutiny. Greater control, and deterring abuses, will facilitate "accuracy, transparency, and public confidence" in a "form of litigation on which many people rely to obtain effective access to justice." (*Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 506, 511-512 (*Laffitte*) (Liu, J., concurring).)

B. California's Statutory Framework on Appellate Standing and Intervention is Not Analogous to Federal Law and Effectively Regulates Objector Participation

In urging that California align with federal law on the right to appeal, Muller is thwarted by a basic difference setting California appellate procedure apart. Although implicating policy considerations that favor intervention, the issue for this Court is ultimately statutory.

In the federal system, a "party" who may appeal is a matter of decisional law. The U.S. Supreme Court explained: "We have held that 'only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.'" (*Devlin, supra,* 536 U.S. at p. 7, quoting *Marino v. Ortiz* (1988) 484 U.S. 301, 304.) But the California Legislature defines state appellate rights. Under California law, "the right of appeal is entirely statutory." (*Leone v. Medical Bd. of Cal.* (2000) 22 Cal.4th 660, 668 (*Leone*).) It is "'subject to complete legislative control.'" (*Powers v. City*

of Richmond (1995) 10 Cal.4th 85, 105 (*Powers*) (lead opinion of Kennard, J.), quoting *Trede v. Superior Court* (1943) 21 Cal.2d 630, 634.) Consequently, "a judgment or order is not appealable unless expressly made so by statute." (*People v. Mazurette* (2001) 24 Cal.4th 789, 792.)

Appellate review is taken as a given but, to place the issue presented in perspective, there is no right to appeal any particular ruling under either California or federal law. According to this Court, "there is no constitutional right of appeal" in the state system. (*Leone, supra*, 22 Cal.4th at p. 668; see also *Powers, supra*, 10 Cal.4th at p. 109 [collecting cases].) Similarly, "it is well settled" that there is no federal "constitutional right to an appeal." (*Abney v. U. S.* (1977) 431 U.S. 651, 656, citing *McKane v. Durston* (1894) 153 U.S. 684 (*McKane*).)

As a result, federal due process is paramount in class actions up to final judgment. (See, e.g., *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 810-812 [notice and opting out].) But unlike constitutional rights attaching at the trial level in class actions, a right to appeal is "not a requirement of due process." (*National Union of Marine Cooks and Stewards v. Arnold* (1954) 348 U.S. 37, 42-43; accord, *District of Columbia v. Clawans* (1937) 300 U.S. 617, 627.) "It is wholly within the discretion of the State to allow or not to allow such a review." (*McKane, supra*, 153 U.S. at p. 687.)

Against this backdrop, the California enactment governing appellate standing provides: "Any party aggrieved may appeal in the cases prescribed in this title." (Code Civ. Proc., § 902.) Even if Muller is assumed to be aggrieved, she thus must also be a "party" under section 902. In the modern seminal decision, the Court reiterated that this means a "party of record" who has intervened, thereby "obtain[ing] a right to appeal by moving to vacate the judgment pursuant to Code of Civil Procedure section

663." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736 (*Carlson*), citing *Eggert, supra,* 20 Cal.2d at p. 201.)

Muller identifies no compelling reason to disregard section 902 and this Court's longstanding precedent construing it. She seeks to reframe the issue as whether class actions are judicial creations, with rights reshaped as the Court sees fit, but the lack of statutory foundation for her proposed appellate right is fatal.

As with other procedures recently recommended, the intervention "approach has doctrinal and practical virtues." (*Laffitte, supra,* 1 Cal.5th at p. 507 (Liu, J., concurring).) Although unnamed class members do not have the same duties or responsibilities as class representatives – CAOC disagrees with respondents in this respect – intervention puts absent class members and their counsel squarely before the trial court. A complaint-in-intervention is a vehicle to outline objections with some precision that aids both the judge and the parties.

Under permissive intervention, the complaint is a means for demanding "anything adversely to both the plaintiff and the defendant" by "setting forth the grounds upon which the intervention rests" – in this setting, the unnamed class member's objections. (Code Civ. Proc., § 387, subd. (a).) Under mandatory intervention, the objector's complaint is a means for establishing that "disposition of the action may as a practical matter impair or impede" the objector's "ability to protect [his or her] interest" and that this interest is not "adequately represented by existing parties." (*Id.*, subd. (b).) The adequate representation component of mandatory intervention is akin to the due process and California requirements of adequate representation in class actions. (*Hansberry v. Lee* (1940) 311 U.S. 32, 42-43 [unnamed class members "may be bound by the judgment" only when "they are in fact adequately represented"]; *Richmond*

v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 470-475 [also noting use of intervention in class proceedings].)

Contrary to Muller's assertion, experience under *Devlin* has taught that filing an objection is *not* the procedural equivalent of intervening. Whether permissive or mandatory, intervention requires lawyers to make an appearance and subject themselves to the court's jurisdiction. In some federal class actions, district judges inclined to impose discipline refrained from doing so because of uncertainty on whether they had jurisdiction over an unnamed class member's attorney. (See, e.g., *In re Hydroxycut Marketing and Sales Practices Litigation* (S.D. Cal., Mar. 3, 2014, No. 09CV1088 BTM KSC) 2014 WL 815394, at *3.)

CAOC does not suggest that intervention in the class context be applied formalistically or denied based on technicalities. Unnamed class members have the right to opt out or be heard before final judgment; this is not the issue. More narrowly, if they wish to appeal after proceedings before the trial judge, they must follow the same rules that apply to any other "party of record" in the California courts. (*Carleson, supra,* 5 Cal.3d at p. 736.) In this core respect, the Court of Appeal was manifestly correct. Although there are reasonable contentions against intervention, they are outweighed by the factors favoring it. At any rate, this Court should not alter its reading of section 902 just for class actions.

Indeed, California has no Rule 23. Since the 1872 enactment of Code of Civil Procedure section 382 – the statutory font for state class action jurisprudence – California has developed its own body of class action law. Quoting the statute, this Court has explained: "Code of Civil Procedure section 382 authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court....'"

(*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The independent line of modern seminal precedents applying section 382 began with *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, handed down just as modern Rule 23 took effect. The Court then looked to federal class action doctrine "[i]n the event of a hiatus" – to fill gaps. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821.) Over time the gaps have closed. (See, e.g., *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437-438 [merits inquiries generally barred for class certification under section 382].)

Viewing the claimed appellate right here from this vantage point leads to the same conclusion. There is no gap. Adopting the federal approach to appeals by absent class members, moreover, would disregard California's distinct statutory framework governing the right to appeal.

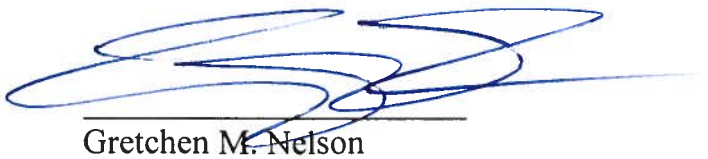
IV. CONCLUSION

The Court of Appeal's dismissal of the appeal should be affirmed.

Dated: March 30, 2017

Respectfully submitted,

NELSON & FRAENKEL LLP



Gretchen M. Nelson

Counsel for Amicus Curiae Consumer Attorneys of California

CERTIFICATE OF COMPLIANCE

Under California Rule of Court 8.204(c)(1), counsel of record certifies that this Application to File and Amicus Curiae Brief of Consumer Attorneys of California Supporting Plaintiffs-Respondents is produced using 13-point Times New Roman type, including footnotes, and contains 3,330 words. Counsel relies on the word count provided by Microsoft Word word-processing software.

DATED: March 30, 2017

Gretchen M. Nelson

Attorney for Amicus Curiae
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DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is, and was at the time of service, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to, or interested in, this legal action; and that declarant's business address is 707 Wilshire Blvd., Suite 3600, Los Angeles, CA 90017.

2. That on March 30, 2017, declarant served this Application to File and Amicus Curiae Brief of Consumer Attorneys of California Supporting Plaintiffs-Respondents by depositing a true copy in the United States mail at Los Angeles, California in a sealed envelope with postage fully prepaid, addressed to the following interested parties and courts:

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3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 30th day of March, 2017, at Los Angeles, California.

Patty Davis

Patty Davis