No. S222996

IN THE SUPREME COURT OF CALIFORNIA

MARK LAFFITTE, *et al.*,

Plaintiffs-Respondents,

v.

ROBERT HALF INTERNATIONAL, INC., *et al.*,

Defendants-Respondents,

DAVID BRENNAN,

Objector-Appellant.

SECOND APPELLATE DISTRICT, DIVISION SEVEN, NO. B249253;
LOS ANGELES SUPERIOR COURT, CASE NO. BC 321317
[RELATED TO BC 455499 & 377930], HON. MARY H. STROBEL

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR PERMISSION TO FILE AN *AMICUS CURIAE* BRIEF; [PROPOSED] BRIEF OF *AMICUS CURIAE* CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF RESPONDENTS

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APPLICATION TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to rule 8.520(f) of the California Rules of Court, Consumer Attorneys of California ["Consumer Attorneys"] seek permission to file the attached Brief of *amicus curiae* in support of Respondents.

STATEMENT OF INTEREST

Consumer Attorneys is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the Courts and the Legislature. As an organization representative of the plaintiff's trial bar throughout California, Consumer Attorneys is interested in protecting California citizens' rights, including those relating to access to the courts and justice.

Consumer Attorneys has reviewed the briefs filed in this case and believes that this Court will benefit from additional briefing on the impact this appeal and its potential reconsideration of *Serrano v. Priest* (1977) 20 Cal.3d 25 will have on consumers and their ability to have access to the courts and justice.

HOW THE PROPOSED BRIEFING WILL ASSIST THE COURT

The proposed Brief provides the Consumer Attorneys' unique perspective on the impact of *Serrano v. Priest* on consumers and their ability to obtain access to justice. While these issues were tangentially proffered by the parties, the Consumer Attorneys seek to fully brief the issue of how Respondents' position that trial courts cannot base an award of class counsel

fees on a percentage of the common fund will have a "chilling effect" on consumer's access to the courts.

DISCLOSURE

No party, or counsel for any party, in the matter pending before this Court either authored the proposed *amicus curiae* brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. No person or entity has made any monetary contribution intended to fund the preparation or submission of this Brief.

CONCLUSION

For the foregoing reasons, *amicus curiae* Consumer Attorneys of California respectfully request that the Court accept the accompanying Brief for filing and consideration.

Dated: December 13, 2015

Respectfully submitted,

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BRIEF OF AMICUS CURIAE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFFS MARK LAFFITTE, *ET AL.*

INTRODUCTION

In 1977, this Court issued its opinion in *Serrano v. Priest* (1977) 20 Cal.3d 25 *("Serrano III")* regarding the determination of class action fees in a non-common fund context. Since that time, various parties who seek to deter and prevent the filing of class actions have argued that *Serrano III* prohibits trial courts from utilizing the percentage of common fund approach for the determination of reasonable class counsel fees.

Appellant has adopted a similar tactic in this appeal. In addition to misconstruing the scope and effect of *Serrano III*, Appellant does not recognize the underlying purpose behind the award of attorneys' fees in class actions. As the Court below ruled, the determination of a reasonable fee based upon the percentage of the common fund approximates "what the market would pay for comparable litigation services rendered pursuant to a fee agreement." *Laffitte v. Robert Haft International, Inc.* (2014) 231 Cal.App.4th 860, 877, *review granted* ____ Cal.4th ____, 184 Cal.Rptr.3d 78. The inherent danger in failing to award a fair market value fee for class counsel is that it would discourage qualified attorneys from taking on the very real risks involvd in representing individuals against large corporations in class actions. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33.

If that were to happen, the public and this Court's paramount interest of providing access to justice would be defeated. As this Court has repeatedly held, class actions advance the public policy and interest of providing access to justice for small claimants whose individual claims are too small to warrant individual litigation. *Linder v. Thrifty Oil Co*. (2000) 23

Cal.4th 429, 434-35; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.

Accordingly, Consumer Attorneys as amicus respectfully submit that this Court should fully consider the impact that a ruling prohibiting trial courts from utilizing the percentage of common fund approach in the award of class action fees would have on ordinary citizen's ability to obtain redress for claims that are ideally suited for adjudication by class actions.

ARGUMENT

TRIAL COURTS SHOULD BE GIVEN THE ABILITY TO DETERMINE ATTORNEYS FEES IN CLASS ACTIONS USING THE PERCENTAGE OF COMMON FUND APPROACH

At the outset, the Consumer Attorneys agrees with Plaintiff Mark Laffitte's analyses that *Serrano III* does not apply or extend to settlements involving common fund recoveries for the class. In *Serrano III,* the Court expressly acknowledged the principle that attorneys' fees can be awarded out of a common fund – but that in the matter before it, "we can find no such fund." *Serrano III*, 20 Cal.3d at 36. In fact, in *Ketchem v. Moses, supra,* this Court expressly noted that the lodestar method will not always be required even in fee shifting cases. *Ketchem*, 24 Cal.4th at 1136 ("[W]e are not mandating a blanket 'lodestar only' approach.")

In fact, California appellate courts have ruled that fee awards based upon the percentage of the common fund are entirely appropriate. *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557-58; *see also Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 65-66 (fees based on "percentage[s]" are "awarded in common fund cases," although "[i]t is not an abuse of discretion to choose one method over the other"); *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26-27 ("[p]ercentage

fees have traditionally been allowed in … common fund cases …" if the action "results in the establishment of a separate or so-called common fund for the benefit of the class").

Beyond his mischaracterization of the scope and effect of *Serrano III*, Appellant ignores the public policy supporting class actions and the concomitant need to provide trial courts with the flexibility to calculate a reasonable fee for class counsel. This Court has consistently recognized that class actions serve the important public function in our judicial system of providing small claimants with access to justice for claims that would otherwise be too small to warrant individual litigation. *Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 434-35; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469. It is well established that protecting "unwary customers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808.

However, in contrast to large corporations that have vast resources to pay top-tiered law firms to represent them in class actions, a consumer's access to high quality legal representation is fully dependent upon compensating counsel on a contingency fee basis. Thus, as the Court of Appeal recognized, the process of determining a reasonable fee in the contingency format is to approximate "what the market would pay for comparable litigation services rendered pursuant to a fee agreement." *Laffitte v. Robert Haft International, Inc.*, 231 Cal.App.4th 860, 877 (2014), *review granted*, ____ Cal.4th ____, 184 Cal.Rptr.3d 78. In most cases in which class counsel fees are sought from a common fund recovery, it is a contingency fee that would most closely replicate the applicable market for comparable litigation services.

Unlike the major law firms that often represent the defendants in class actions, those representing plaintiffs in class action receive no compensation

for their services for many years until the case is resolved, if at all. In some cases (such as in this case) the delay in payment can be more than one decade. During that time, all staff and overhead costs (as well as case costs) must be absorbed by the law firm representing the class. In other instances, the representation is a complete loss to the plaintiff law firm – despite many years of litigation. *E.g.*, *Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50 and *Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373 (following seven years of litigation, class action that was ultimately decertified following two trips to the Court of Appeal.)

Appellant ignores the fact that – "but for" the efforts of class counsel – there would be no common fund from which either attorneys' fees or class recovery could be obtained. As this Court aptly noted in *Linder*, a class action is "often the only effective way to halt and redress" a wrong when a business causes a limited amount of individual monetary harm to a large number of individuals. *Linder*, *supra*, 23 Cal.4th at 446. However, "[i]f the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear." *Muehler v. Land O'Lakes, Inc.* (D. Minn. 1985) 617 F.Supp.1370, 1376. Indeed, attorneys "will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if [attorneys are] assured that [they] will be promptly and directly compensated should [their] efforts be successful." *Melendres v. City of Los Angeles* (1975) 45 Cal.App.3d 267, 273.

Based upon the foregoing, it is not surprising that virtually all federal circuits permit trial judges to utilize the percentage of recovery approach to determine the reasonable contingency fee for class action attorneys. (*See* Respondents' Brief, pp. 11-14.) When circumstances permit, the awarding of fees as a percentage of the common fund most closely aligns the interests of the class and their attorneys. It also "provides a powerful incentive for the

efficient prosecution and early resolution of the litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.* (2d Cir. 2005) 396 F.3d 96, 121.

Consumer Attorneys does not believe that California jurisprudence supports the application of mechanized rules for the determination of attorneys' fees, especially when such rules could deprive trial courts of the ability to dispense justice. Although not briefed by any of the parties, the application of a "benchmark" to any particular case could be viewed by trial courts as either a cap or floor – which could prevent the individualized determination of the appropriate market-derived fee to the unique circumstances of every case. For decades, California trial courts have effectively determined class counsel fees in common fund cases without being restricted by any artificial benchmark or standardized percentage.

Finally, in the unlikely event that Appellant is correct that *Serrano III* sets forth a prohibition against California trial courts utilizing the pure percentage of common fund approach for the award of class counsel fees, this Court's experience over the last 38 plus years warrants a re-examination of such a rule. In the four decades since *Serrano III*, this Court and the federal appellate courts across this nation have had ample opportunity to apply both the lodestar and percentage of common fund method for the award of class counsel fees. If the law is as Appellant suggests, this Court is fully empowered to review and correct that precedent. *Trope v. Katz* (1995) 11 Cal.4th 274, 288 (Supreme Court is empowered to overrule a precedent by considering "the age of the precedent, the nature and extent of public and private reliance on it, and its consistency or inconsistency with other related rules of law.")

Nonetheless, a plain reading of *Serrano III* and the other decisions of this Court supports Respondents' and the Court of Appeal's interpretation that a trial court is empowered to use the percentage of common fund approach for the determination of attorneys' fees. Any contrary ruling would

run counter to the public's interest and would severely restrict consumers' access to the courts.

CONCLUSION

For the foregoing reasons, *amicus curiae* Consumer Attorneys of California respectfully submit that trial courts should be given the discretion to utilize the percentage of common fund method for the determination of class action fees.

Dated: December 14, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that this brief contains 2,084 words as counted by the Microsoft Word word-processing software. This word court is exclusive of the Table of Contents, Table of Authorities, and this certificate, but inclusive of all footnotes.

This certificate is prepared in accordance with California Rules of Court, Rule 8.204(c).

/s/ *Richard L. Kellner*

Richard L. Kellner