NO. S222996

Appellate No. B249253

IN THE SUPREME COURT OF CALIFORNIA

MARK LAFFITTE, *et al.*,

Plaintiffs and Respondents,

vs.

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

Defendants and Respondents,

DAVID BRENNAN,

Plaintiff and Appellant.

After a Decision of the Court of Appeal, Second Appellate District, Div. Seven, No. B249253;
Los Angeles Superior Court, Stanley Mosk Courthouse, Case No. BC 321317
[related to BC 455499 and BC 377930], Hon. Mary H. Strobel, Judge

PETITION FOR REVIEW

LAWRENCE W. SCHONBRUN (CSB No. 054519)
LAW OFFICE OF LAWRENCE W. SCHONBRUN
86 Eucalyptus Road
Berkeley, CA 94705
Telephone: (510) 547-8070
Attorney for Plaintiff Class Member/Objector-Appellant and Petitioner David Brennan

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Codes and Rules **Page**

Texts, Treatises, and Other **Page**

INTRODUCTION

Plaintiff Class Member/Objector and Appellant David Brennan respectfully petitions this Court for review of the October 29, 2014, opinion (initially unpublished) of the California Court of Appeal, Second Appellate District, *Laffitte v. Robert Half Int'l, Inc., et al.; David Brennan, Plaintiff and Appellant,* No. B249253, 2014 Cal.App. LEXIS 1059 (2d App. Dist., Div. 7, Oct. 29, 2014) (hereinafter "*Half* decision").

On November 21, 2014, the Second District issued an "Order Modifying Opinion and Certifying for Publication; No Change in Judgment" under California Rules of Court (hereinafter CRC), Rules 8.1120(a) and 8.1105(c), as a result of two letters submitted to the Second District that sought publication. One of those letters was from Consumer Attorneys of California.[1]

A copy of the published opinion is attached as Exhibit 1.

A copy of the "Order Modifying Opinion and Certifying for Publication; No Change in Judgment" is attached as Exhibit 2.[2]

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[1] A professional association of attorneys (formerly California Trial Lawyers Association), www.caoc.org.

[2] The Second Appellate District's modifications to the text of the initially unpublished opinion have not yet been included in the published version.

STATEMENT OF ISSUES PRESENTED

Does this Court's seminal decision in *Serrano v. Priest*, 20 Cal.3d 25 [141 Cal.Rptr. 315] (Oct. 4, 1977) (hereinafter *Serrano III*), establishing the rules for judicial calculations of reasonable attorneys' fees:

> "The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case."
>
> *Serrano III*, 20 Cal.3d at 49 n.23 (emphasis added), *citing City of Detroit v. Grinnell Corp.* 495 F.2d 448, 470 (2d Cir. Mar. 13, 1974),

permit a California trial court to anchor its calculation of a reasonable attorneys' fee award from a class action common fund on the percentage-of-the-fund approach,[3] using a lodestar calculation merely as a cross-check of the selected percentage?

The *Half* decision, citing published California appellate authorities, holds that a California trial court has discretion to anchor its calculation of a reasonable attorneys' fee by employing either the percentage-of-the-fund approach or the lodestar/multiplier approach. When using the percentage-of-the-fund approach as the starting point, the *Half* court holds that a trial court may employ a lodestar calculation to merely cross-check the selected percentage.

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[3] Also referred to as the percentage-of-the-benefit approach or the percentage-of-the-recovery approach.

The percentage-of-the-fund approach involves selecting a percentage of the amount of money in the settlement fund as a reasonable attorneys' fee. In the lodestar/multiplier approach, the court determines the reasonable amount of time spent on the legal services provided, which is multiplied by the prevailing market rates for the services rendered, and then possibly enhancing the award for enumerated special factors.

REASONS FOR GRANTING REVIEW

1. This Court should grant review of the *Half* decision "to secure uniformity" (CRC 8.500)(b)(1)) because there is a split of authority among courts of appeal in California about how trial court judges may calculate reasonable attorneys' fees awarded from class action common fund settlements.

A. There are presently at least three different and contradictory published appellate decisions interpreting *Serrano III, supra*.

(1) The most extreme interpretation of *Serrano III* is this *Half* decision. According to *Half*, the starting point for the calculation of a reasonable attorneys' fee from a class action common fund may be either the percentage-of-the-recovery approach or the lodestar/multiplier approach. Where the trial court chooses to anchor the fee award to the percentage-of-the-recovery approach, it may use a lodestar calculation as a mere cross-check:

> The trial court also performed a lodestar calculation to cross-check the reasonableness of

> the percentage of fund award. This was entirely proper.

(*Half*, Exhibit 1-11 at *33.)

The *Half* decision amounts to a repudiation of this Court's *Serrano III's* decision:

> "The starting point of every fee award ... must be a calculation of the attorney's services in terms of the time he has expended on the case.
>
> Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."

Serrano III, supra,, 20 Cal.3d at 49 n.23, *citing City of Detroit v. Grinnell,* 495 F.2d at 470, *supra* (emphasis added).

> Fundamental to its [the trial court's] determination – and properly so – was a careful compilation of the time spent and reasonable hourly compensation of each attorney ... involved in the presentation of the case.

Serrano III, supra, 20 Cal.3d at 48 (emphasis added; footnote omitted).

(2) A different interpretation of *Serrano III* was issued by the First Appellate District's decision in *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19 [97 Cal. Rptr. 2d 797] (1st App. Dist. July 10, 2000). *Lealao* follows *Serrano III*'s direction to anchor the award of reasonable attorneys' fees to a lodestar calculation as a first step. However, the *Lealao* court goes on to say that after the initial lodestar calculation is made, a trial court may consider a percentage-of-the-fund analysis in determining an appropriate lodestar

enhancement.[4] In so holding, the *Lealao* court nonetheless conceded the uncertainty of its modification of *Serrano III*:

> Prior to 1977, when the California Supreme Court decided *Serrano III, supra,* 20 Cal.3d 25, California courts could award a percentage fee in a common fund case.... After *Serrano III*, it is not clear whether this may still be done.
> ....
> As we have said, the California Supreme Court has never prohibited[5] adjustment of the lodestar [based on a percentage-of-the-benefit analysis].

Lealao, supra, 82 Cal.App.4th at 27 (emphasis added) and at 49, respectively.

(3) The third interpretation of *Serrano III* is diametrically opposed to *Half* and *Lealao*. The Second Appellate District's decision in *Jutkowitz v. Bourns, Inc., et al.*, 118 Cal.App.3d 102 [173 Cal.Rptr. 248] (2d App. Dist. Apr. 16, 1981) (and the cases adopting its reasoning[6]) holds that under *Serrano III,* not only must

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[4] The terms "lodestar multiplier" and "lodestar enhancement" can be used interchangeably.

[5] Petitioner notes that, on the other hand, the Supreme Court has never approved such an adjustment either.

[6] *Accord, The People ex rel. Dep't of Transp. v. Yuki, et al.*, 31 Cal.App.4th 1754, 1769, 1770 [37 Cal.Rptr.2d 616] (6th App. Dist. Jan. 6, 1995), *citing Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal.App.3d at 914, 954 [218 Cal.Rptr. 839] (4th App. Dist. Sept. 30, 1985) (citation omitted):

> "'[T]he correct amount of compensation cannot be arrived at objectively by simply taking a percentage [of the recovery].'"
> ....
> [It is improper to calculate] "fee awards that bear no relationship to the amount of attorney time actually incurred

the lodestar approach be the first step in the calculation, but that percentage-based contingent fee litigation cannot be part of a judicial determination of a reasonable attorneys' fee.

> In our opinion, the clear thrust of the holding in *Serrano, supra,* and the cases upon which that holding relied, is a rejection of any "contingent fee" principle in cases involving equitable compensation for lawyers in class actions or other types of representative suits.

Jutkowitz, supra, 118 Cal.App.3d at 110 (emphasis added).

B. These conflicts are confirmed by the Fourth Appellate District decision in *Dunk v. Ford Motor Co.*:

> Later cases have cast doubt on the use of the percentage method to determine attorney fees in California class actions.
> ....
> The award of attorney fees based on a percentage of a "common fund" recovery is of questionable validity in California....

Dunk v. Ford Motor Co., et al., 48 Cal.App.4th 1794, 1809 [56 Cal. Rptr.2d 483] (4th App. Dist. Aug. 30, 1996) (emphasis added).

---

in the preparation and trial of the case."

and *Salton Bay Marina, supra,* 172 Cal.App.3d at 954, *citing Jutkowitz, supra,* 118 Cal.App.3d at 111 (emphasis added):

> "While the size of the class may affect the complexity of counsel's task and the size of the fund created may reflect the quality of his work, the correct amount of compensation cannot be arrived at objectively by simply taking a percentage of that fund."

The Consumer Attorneys of California's letter seeking publication of the *Half* decision reenforces Petitioner's argument regarding the unsettled state of the law on judicial calculations of reasonable attorneys' fee awards from class action common funds. The letter correctly states that the *Half* decision breaks new ground in holding that in awarding a reasonable attorneys' fee from a common fund, the trial court may place primary reliance on the percentage-of-the-recovery approach, using a lodestar calculation as a mere cross-check.

The letter also identified two recent federal court decisions, *In re Apple iPhone/iPod Warranty Litig.*, No. C 10-1610 RS, 2014 U.S. Dist. LEXIS 52050 (N.D. Cal., San Francisco Div., Apr. 14, 2014), and *Fraley v. Facebook, Inc.*, No. C 11-1726 RS, 2013 U.S. Dist. LEXIS 124023 (N.D. Cal., San Francisco Div., Aug. 26, 2013), acknowledging the controversy surrounding the proper use of the percentage-of-the-fund method when calculating reasonable attorneys' fees under California law.

> Indeed, some post-*Serrano III* appellate opinions have questioned the continued availability of the percentage of fund method. *See e.g. Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1809, 56 Cal. Rptr. 2d 483 (1996)* ("The award of attorney fees based on a percentage of a 'common fund' recovery is of questionable validity in California.").

In re Apple iPhone, supra, 2014 U.S. Dist. Lexis 52050, at *6.

> In opposing the fee request, Facebook insists that applicable California law requires that the fee

> award be calculated through the lodestar approach, and *not* as a percentage of the recovery.
>
> *Fraley v. Facebook, Inc., supra,* 2013 U.S. Dist. LEXIS 124023 at *5.

Publication of the *Half* decision, as important as it is, does not resolve the conflict surrounding the meaning of *Serrano III*. It merely widens and deepens the disagreements among California's appellate courts interpreting *Serrano III*.

Our system of law is based on intermediate appellate courts and trial courts following the instructions of this Court. There is a need for uniformity in how reasonable attorneys' fees are to be calculated in California. This Court should rule on which interpretation(s) of *Serrano III* is correct:

(1) The lodestar is the starting point for the judicial calculation of a reasonable attorneys' fee awards paid from a class action common fund. *See Serrano III, supra,* and *Lealao, supra.*

(2) Either the lodestar/multiplier approach or the percentage-of-the-fund approach may be the starting points. (*Half, supra*, and *Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495 [89 Cal.Rptr.3d 615] (3rd App. Dist. Jan. 27, 2009).)

(3) The lodestar approach must be the starting point for judicial calculation of a reasonable attorneys' fee, and percentages based upon contingent fee litigation cannot be a part of the calculation. (*Jutkowitz, supra*; *The People ex rel. Dep't of Transp. v. Yuki, supra*; and *Salton Bay, supra.*)

(4) The lodestar approach is the starting point for the calculation of a reasonable attorneys' fee, but the percentage-

of-the-recovery approach can be considered in determining a multiplier to the lodestar. (*Lealao, supra, and Chavez v. Netflix,* 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413] (1st App. Dist. Apr. 21, 2008).)[7]

(5) The lodestar/multiplier approach can be used as a cross-check to a fee award anchored to the percentage-of-the-fund approach. (*Half, supra, and Sutter Health, supra.*)

(6) The lodestar/multiplier approach cannot be used as a cross-check to the percentage-of-the-recovery approach.

> [I]t is improper for the trial court to start with the amount of the contingency fee and then work backwards, applying the various other factors in order to justify that amount.

Yuki, supra, 31 Cal.App.4th at 1771 (emphasis added).

Confirming the lack of a unified interpretation of *Serrano III*, Richard Pearl, author of the CEB treatise *California Attorney Fee Awards*, can only speculate on what this Court's position would be on the issue.

> [T]here seems little reason to believe that the California Supreme Court would find them[8] unacceptable.

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[7] As will be explained in the Discussion on page 25, *infra,* the statement in *Chavez, supra,* 162 Cal.App.4th at 65-66, that "It is not an abuse of discretion to choose one method over another...." is incorrectly used as support for the assertion that either the percentage approach or the lodestar approach may be the starting point for a judicial award of reasonable attorneys' fees. *Chavez* was referring to the method for calculating a multiplier using differing percentage-of-the-fund analyses after having performed a lodestar calculation.

[8] Cases that have indicated that the percentage-of-fund method is a permissible starting point.

Richard M. Pearl, *California Attorney Fee Awards,* 3d ed. (CEB Mar. 2014 Update, at § 8.13(b), p. 8-13 (emphasis added).

2. This Court should grant review of the *Half* decision because it is "necessary to ... settle an important question of law...." (CRC, Rule 8.500(b)(1).)

On a regular basis, multimillion-dollar attorneys' fee awards are being taken from class members' common fund recoveries in class action settlements. Whether a percentage-of-the-fund approach will be permitted to anchor or modify such fee awards directly affects the amount of money that will be taken from class members' recoveries. The *Half* decision has cumulative ramifications in the hundreds of millions of dollars. As Richard Pearl has noted, allowing courts to base fee awards on percentages of the amount of the class's recovery increases the amount of money paid toward attorneys' fees.

> Common fund fees, however, can sometimes be calculated using a percentage-of-the-fund method, which can result in fees that the courts might be reluctant to grant under the lodestar-adjustment method.

Pearl, *California Attorney Fee Awards, supra,* at § 5.18, p. 5-11 (emphasis added).

Anchoring the award to the percentage-of-the-recovery approach, in addition to having enormous financial consequences, is important as a matter of legal theory as well.

A. Under this Court's *Serrano III* decision, a reasonable attorneys' fee is directly linked to the legal services provided by the attorney. Under the percentage-of-the-fund method,

the determination of a reasonable fee is based on a totally different concept – the dollar amount of the fund. This conflict in methodology represents a fundamental policy difference on the concept of what is a reasonable attorneys' fee.

Severing the connection between the amount of work required to produce the recovery and the amount of the attorneys' fees undermines the concept of windfall attorneys' fees. The windfall concept is based on the disparity between the amount of money sought by the attorney and the legal services provided by that attorney.

B. The common fund doctrine is based on the concept of *quantum meruit* – the value of the services rendered.

> An award of fees under the equitable common fund doctrine is "'analogous to an action in quantum meruit: The individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed.'"
>
> *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc.*, 127 Cal.App.4th 387, 397 [25 Cal.Rptr.3d 514] (2d App. Dist. Mar. 7, 2005), *citing Serrano v. Unruh,* 32 Cal.3d 621, 628 [186 Cal.Rptr. 754] (Oct. 28, 1982) (emphasis added).

Basing an attorneys' fee award on a percentage of the dollar amount of the settlement fund violates the very principle upon which the common fund doctrine was established. Furthermore, to allow attorneys' fee awards to be based on a percentage of the class settlement fund is inconsistent with California class action attorneys' fee jurisprudence:

> Nonetheless, the plaintiffs' attorneys owe an ethical and fiduciary duty to their clients ... to limit fees to an amount that represents the value of the work done.

Robbins v. Alibrandi, 127 Cal.App.4th 438, 444 [25 Cal.Rptr.3d 387] (1st App. Dist. Feb. 4, 2005) (emphasis added).

C. Contingent fee principles from traditional single-plaintiff models of tort litigation are incompatible with the founding principles of the common fund doctrine:

> Counsel fees ... [awarded under the common fund doctrine,] if made with moderation and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice.

Trustees v. Greenough, 105 U.S. 527, 536-37 (May 8, 1882) (emphasis added). *Accord, Garabedian v. Los Angeles Cellular Telephone Co.*, 118 Cal.App.4th 123, 128 [12 Cal.Rptr.3d 737] (4th App. Dist. Apr. 29, 2004) ("[T]his Court must exercise moderation in determining the ... size [of counsel fees and expenses]...." (citations omitted).)

The *Lealao* court clearly distinguished the calculation of the percentage to be taken from a class action recovery (where there are hundreds, thousands, or even millions of clients) from traditional individual client's contingent fee arrangements from tort law.

> "In a contingent fee case involving a small number of plaintiffs, a percentage of the recovery, even a fairly large percentage such as 331/3 percent, will frequently yield a result that is fair to both the attorney and the client in light of the value provided to the client by the attorney. But where

> the size of the settlement is due to the fact that it resolves not just one claim, but large numbers of identical claims, and the services of the attorney are essentially the same as would have been required if there had been only one claim, it makes no sense to gear the fee award to the total dollar amount of the settlement..... However, treating the recovery of every class member in an identical way for fee purposes, and awarding the attorney a fee based upon a percentage of the total recovery, cannot be justified, even if the percentage is 'small,' as is frequently argued in support of percentage fees in class actions."

Lealao, supra, 82 Cal.App.4th at 49 n.16, *citing* John F. Grady, *Reasonable Fees: A Suggested Value-Based Analysis for Judges,* 184 F.R.D. 131, 141-142 (1998) (footnote omitted).

D. The purpose of the class action mechanism is to provide access to the courts by allowing lawyers to aggregate small claims. It is the mechanism itself that makes individual small claims viable to pursue through litigation. A contingent fee is an entirely different mechanism used in personal injury accident litigation where one plaintiff pays a lawyer typically one-third (1/3) of his or her recovery to pursue one individual claim.

These two theories, while superficially similar in that they both involve contingent legal services, serve very different numbers of plaintiffs. The aggregation of large numbers of claims into a class action produces very large potential liabilities, creating a strong pressure to settle that is absent in individual tort claims. This pressure greatly reduces contingent risk, as demonstrated by the fact that almost all class actions settle. Because of that, the contingent fee methodology for individual tort claims is fundamentally incompatible

with a mechanism designed to join a large number of small claims in a court proceeding.

If *Half* is to change common fund reasonable attorneys' fee jurisprudence so radically from its historical roots, that decision should be made by this Court. It should not be left to varying contradictory appellate court decisions by lower courts or legal commentators "reading tea leaves" about what this Court would likely do.

3. This Court should grant review because, as is made clear in *Serrano III,* judicial determinations of reasonable attorneys' fees involve important issues of public policy and the public's respect for the legal profession and the judiciary.

> "Anchoring the analysis to this concept [the lodestar method] is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."

Serrano III, supra, 20 Cal. at 49 n.23, *citing City of Detroit v. Grinnell, supra,* 495 F.2d at 470 (emphasis added). *Accord, Jutkowitz v. Bourns, supra,* 118 Cal.App.3d at 111 (emphasis added):

> [A]s was stated in *Serrano v. Priest, supra,* favorable public perception and the prestige of the legal profession and our system of justice, requires a formula for computation which can be objectively measured.

Reasonable attorneys' fees paid to attorneys from common fund class action recoveries is an issue of continuing public importance. It merits this Court's providing a clear explanation of

how *Serrano III* should be interpreted by the appellate and trial courts of this state, as well as federal courts, when called upon to calculate reasonable attorneys' fees under California law.

4. This Court should grant review because it is unlikely this issue will be raised again anytime soon.

Petitioner respectfully requests that this Court grant review of the *Half* decision because there is a substantial likelihood that this issue will not be brought to this Court for review anytime soon. As noted by Seventh Circuit Court of Appeal Judge Frank H. Easterbrook, basic issues of class action jurisprudence are often not vetted in appellate courts:

> 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).

Questions about the proper roles for the percentage approach and the lodestar/multiplier approach were first raised in *Jutkowitz, supra,* in 1981. The issue of the differing appellate interpretations of this Court's *Serrano III* decision was discussed in *Dunk, supra,* in 1996, and in *Lealao, supra,* in 2000. There has been no resolution to this conflict in all this time. It is unlikely that another opportunity to address these issues will arise anytime soon. .

5. This Court should grant review because the judiciary has a special responsibility to ensure the proper functioning of the class action mechanism.

The class action is a judicial creation. Although not indifferent to whether the class in the aggregate or the attorneys will receive more money, individual unnamed class members do not have a sufficient financial interest to pursue resolution of this conflict in attorneys' fee jurisprudence. Indeed, that is why the California judiciary has an essential role in the protection of class members in class actions.

> "The courts are supposed to be the guardians of the class."

Kullar v. Foot Locker Retail, Inc., et al., 168 Cal.App.4th 116, 129 [85 Cal.Rptr.3d 20] (1st App. Dist. Oct. 14, 2008) (citation omitted).

This responsibility reaches to the appellate courts as well.

> While the statements in In re GM Trucks and Zucker refer to the authority of district, not appellate, courts in connection with class action settlements, the cases make clear that reviewing courts retain an interest – a most special and predominate interest – in the fairness of class action settlements and attorneys' fee awards.

In re Cendant PRIDES Litig., 243 F.3d 722, 731 (3d Cir. Mar. 21, 2001) (emphasis added).

STATEMENT OF THE CASE

This class action involves a wage and hour dispute by employees of Robert Half International, Inc. Filed in the Los Angeles County Superior Court, the settlement created a common fund of $19 million. The Settlement Agreement negotiated between class counsel and defendant reads:

> Class Counsel will apply to the Court for an award of not more than $6,333,333.33 (33.33%) of the Gross Settlement Amount)....

(R.A., Vol. 1, Tab 6 at 72, ¶ III.C.2.)

The "Notice of Class Action Settlement" that was sent to class members advised them that:

> Class Counsel ... will seek approval from the Court for the payment in an amount not more than $6,333,333.33 for their attorneys' fees....

(AA 5.)

On January 28, 2013, Plaintiff Class Member/Objector Brennan objected to Class Counsel's attorneys' fee request. (AA 7.)

On April 10, 2013, the trial court approved the settlement and awarded Class Counsel $6,333,333.33 (or 33.33% of the class's settlement fund). (AA 191.)

On June 10, 2013, Plaintiff Class Member/Objector Brennan appealed the trial court's Order Granting Final Approval of Class Action Settlement and Judgment Thereon to the Second District Court of Appeal. (AA 195.)

On October 29, 2014, the Court of Appeal for the Second Appellate District issued its subsequently published opinion, affirming

the trial court's award of 33-1/3 percent of the class's recovery as a reasonable attorneys' fee to Class Counsel. (Exhibit 1 attached.)

On November 21, 2014, the Second District issued an order that modified its opinion and certified it for publication, with no change in judgment. (Exhibit 2 attached.)

The Second District's decision became final on November 28, 2014. A petition for rehearing was not filed in this case.

LEGAL DISCUSSION

The *Half* decision, permitting the judicial anchoring of awards of reasonable attorneys' fees to the percentage-of-the-fund approach and using the lodestar as mere cross-check:

> We also confirm that the percentage of recovery method for calculating an award of attorneys' fees is still viable in common fund cases.

(*Half*, Ex. 2-1, Order Modifying Opinion, etc.);

> The percentage of fund method survives in California class action cases, and the trial court did not abuse its discretion in using it, in part [with a lodestar cross-check], to approve the fee request in this class action.

(*Half*, Ex. 1-10, at *31),

conflicts with *Serrano III*, *supra*.

I.

THE *HALF* DECISION CONTRADICTS THIS COURT'S HOLDING IN *SERRANO III*

This Court could understandably ask, how could the *Half* court begin its fee discussion by quoting from *Lealao* this Court's instructions in *Serrano III*:

> In *Lealao v. Beneficial California, Inc., supra, 82 Cal.App.4th 19* the court stated that "[t]he primacy of the lodestar method in California was established in 1977 in *Serrano [v. Priest (1977)] 20 Cal.3d 25 [141 Cal. Rptr. 315, 569 P.2d 1303]*.... [O]ur Supreme Court declared: '"The starting point of every fee award ... must be a calculation of the attorney's services in terms of the time he has expended on the case."'" (*Id. at p. 26.*)

(*Half,* Ex. 1-9 at *27),

and then conclude that either the percentage-of-the-fund approach or the lodestar approach may be the starting point for the calculation of a reasonable attorneys' fee?

A. The *Half* court's holding that the percentage-of-the-fund approach can be used as a starting point for the calculation of a reasonable attorneys' fee from a class action common fund, with the lodetar analysis as a mere cross-check, is contrary to this Court's seminal decision in *Serrano III.*

1. The *Half* court ignored:

   (a) The holding in *Lealao* that states:

   > [*Serrano III*] said ... "the *starting point*" of every equitable fee award "'must be a calculation of the attorney's services in terms of the time he has

> expended on the case.'" (*Serrano III, supra*, 20 Cal.3d at p. 48, fn. 23, italics added.)

Lealao, supra, 82 Cal.App.4th at 45.

(b) The holdings of the First Appellate District in *In re Vitamin Cases*, 110 Cal.App.4th 1041 [2 Cal.Rptr.3d 358] (1st App. Dist. July 24, 2003), and *Thayer v. Wells Fargo Bank N.A.*, 92 Cal. App. 4th 819 [112 Cal. Rptr. 2d 284] (1st App. Dist. Oct. 2, 2001), state:

> "'[T]he primary method for establishing the amount of "reasonable" attorney fees is the lodestar method.... Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier" to take into account a variety of other factors.... Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis...."

In re Vitamin Cases, supra, 110 Cal.App.4th at 1052, *citing Thayer, supra,* 92 Cal.App.4th at 833 (internal citation omitted).

(c) The holding in the Second Appellate District's decision in *Jutkowitz, supra,* 118 Cal.App.3d at 110:

> It appears to us that plaintiff's argument is an attempt to engraft a "contingent fee" concept on to the equitable common fund doctrine.
> ....
> Significantly, in none of the "common fund" cases, whether class actions or nonclass actions ... is there any suggestion that *the size of the fund controls the determination of what is adequate compensation.*

(d) The holding in the Sixth Appellate District's decision in *The People ex rel Dep't of Transp. v. Yuki, supra,*, 31 Cal.App.4th at 1771:

> [I]t is improper for the trial court to start with the amount of the contingency fee and then work backwards, applying the various other factors in order to justify that amount.

(e) The holding in the Fourth Appellate District's decision in *Salton Bay Marina, supra,* 172 Cal.App.3d at 975-58:

> On remand, the court should begin its analysis with a calculation of the attorney services in terms of time the attorneys actually expended on the case. (*Serrano v. Priest, supra, 20 Cal.3d 25, 48, fn. 23.*)

2. The *Half* court's decision, asserting that the *Lealao* court's statement:

> "After *Serrano* ..., it is not clear whether this [fee award based primarily on the percentage-of-the-recovery approach] may still be done."
>
> (*Half,* Ex. 1-10 at *29-*30, *citing Lealao, supra,* 82 Cal.App.4th at 27),

had been "made clear" by subsequent judicial opinions:

> Subsequent judicial opinions have made it clear that a percentage fee award in a common fund case "may still be done."
>
> (*Half,* Ex. 1-10 at *30),

ignores the fact that none of the "subsequent judicial opinions" cited in the *Half* decision emanate from this Court![9]

3. The *Half* decision raises a straw man issue regarding "exclusivity."

> The trial court did not use the percentage of fund method exclusively to determine whether the amount of attorneys' fees requested was reasonable and appropriate. The trial court also performed a lodestar calculation to cross-check the reasonableness of the percentage of fund award. This was entirely proper.

(*Half*, Ex. 1-11 at *33; emphasis added.)

The issue in *Lealao* is not whether the court used the percentage method exclusively (it didn't), but whether a court can use it to anchor the fee award. (*Lealao* said it couldn't.) The court in *Half* got it backwards. Lealao started with a lodestar calculation, using the percentage of the fund as a cross-check.

4. The *Half* decision erroneously claims that the holding in *Consumer Privacy Cases*, 175 Cal.App.4th 545 [96 Cal.Rptr.3d 127] (1st App. Dist. June 30, 2009), supports its decision that either the percentage-of-the-fund or the lodestar approach may be used as a starting point to calculate a reasonable attorneys' fee. (*See Half*, Ex. 1-10, at *30-*31 for discussion.)

> In *Consumer Privacy Cases, supra, 175 Cal.App.4th 545* the court explained that "[r]egardless of whether attorney fees are

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[9] See comment at page 28, *infra*, regarding footnote 8 in the *Half* decision (Ex. 1-12).

> determined using the lodestar method or awarded based on a 'percentage-of-the-benefit' analysis under the common fund doctrine ... [i]t is not an abuse of discretion to choose one method over another as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace...."

(*Half,* Ex. 1-10 at *30-*31, *citing Consumer Privacy Cases, supra,* 175 Cal.App.4th at 557-58 (internal citations omitted).

The *Consumer Privacy Cases* relied on by the *Half* court support the exact opposite principle for which *Half* cited it -- the primacy of the lodestar/multiplier approach.

> The trial court then used a lodestar analysis to determine the base fee, and applied a multiplier to calculate the final award. "[T]he primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method...."
> ....
> "Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis.... This approach "anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary...."

Consumer Privacy Cases, supra, 175 Cal.App.4th at 556-57, *citing Vitamin Cases, supra,* 110 Cal.App.4th at 1052 (internal citations omitted).

5. The *Half* court's reliance on *Apple Computer, Inc. v. The Superior Court of Los Angeles County, et al.*, 126 Cal.App.4th 1253 [24 Cal.Rptr.3d 818] (2d App. Dist. Feb. 17, 2005), is without justification.

The *Half* court cites *Apple Computer* to support its holding. However, *Apple Computer* did not involve a calculation of a reasonable attorneys' fee. The issue was a defendant's attempt to disqualify a law firm from acting as class counsel. There is no discussion of *Serrano III* or *Lealao*. Indeed, *Apple Computer* cites to federal[10] fee jurisprudence.

> And although attorney fees awarded under the common fund doctrine are based on a "percentage-of-the-benefit" analysis, while those under a fee-shifting statute are determined using the lodestar method, "[t]he ultimate goal ... is the award of a reasonable fee to compensate counsel for their efforts, irrespective of the method of calculation."

Apple Computer, supra, at 1270, *citing to* Brytus v. Spang & Co., 203 F.3d 238, 247 (3d Cir. Feb. 7, 2000).

6. *Half's* assertion that *Chavez v. Netflix, supra,* supports its decision is based on a misunderstanding of *Chavez*.

> For example, in *Chavez v. Netflix, Inc. (2008) 162 Cal.App.4th 43* the court stated that "the *Lealao* court did not purport to mandate the use of one particular formula in class action cases. The method the trial court used here and that [was] discussed in *Lealao* are merely different ways of using the same data--the amount of the proposed award and the monetized value of the class benefits--to accomplish the same purpose: to cross-check the fee award against an estimate of what the market would pay for comparable litigation services rendered pursuant to a fee agreement...."

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[10] *See* Discussion, No. 14, page 31, *infra,* that federal fee jurisprudence is not relevant.

(*Half,* Ex. 1-10 at *30; internal citations omitted.)

The *Half* court's assertions that *Chavez* made it clear that (1) the percentage-of-the-benefit methodology can become the anchor for an award of reasonable attorneys' fees, and (2) that the lodestar multiplier/approach can be used as a mere cross-check are based on a misreading of *Chavez.*

The trial court in *Chavez* properly started its calculation with a lodestar determination, and afterward, it sought to use the percentage-of-the-fund approach for enhancing the lodestar amount.

> [The claim was that the trial court] erred in establishing the multiplier by using as a benchmark the percentage of the fees awarded divided by a sum including both the class benefit and the amount of the fee award, and...

Chavez, supra, 162 Cal.App.4th at 63 (emphasis added).

The *Half* court's conclusion of what was at issue in *Chavez, supra,* at 162 Cal.App.4th at 65-66:

> It is not an abuse of discretion to choose one method over another as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace.

misunderstands *Chavez's* discussion..

Chavez does use the words "method" and "formula," but it is not referring to the methodology of the lodestar vs. the percentage approaches. The methodology being referred to in *Chavez* concerns how the percentage-of-the-fund approach should be calculated for its use as an enhancement factor.

> To establish a benchmark for determining the enhanced lodestar amount, the court used the percentages that a hypothetical enhanced fee would represent of the sum of the fee plus the aggregate value of the benefits claimed by class members under the Original Agreement....

Chavez, supra, 162 Cal.App.4th at 64-65.

Chavez does not challenge *Serrano III's* primacy of the lodestar approach.

The use of 33-1/3 percent is justified by the *Half* court, citing to *Chavez*. However, the *Chavez* court relies on federal law, not California law.

> [From] *Chavez v. Netflix, Inc., supra, 162 Cal.App.4th 43* ... 'Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.' [Citation.]" (*Id. at p. 66, fn. 11....*)

(*Half,* Ex. 1-11 at *32.)

The missing internal citation in *Half* for this *Chavez* quote is federal fee jurisprudence, *Shaw v. Toshiba America Information Systems, Inc.,* 91 F. Supp. 2d 942, 972 (E.D. Tex., Beaumont Div., Jan. 28, 2000).

7. *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc., supra,* does not support the *Half* court's holding.

The *Half* court's citation to *Consumer Cause* for support is misplaced.

> [S]ee *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127*

> *Cal.App.4th 387, 397* [the common fund doctrine is "frequently applied in class actions when the efforts of the attorney for the named class representatives produce monetary benefits for the entire class"]....

(*Half*, Ex. 1-10 at *31.)

Common Cause was not a case involving the actual calculation of a reasonable attorneys' fee from a common fund. It concerned whether an objector who succeeds in defeating the approval of a proposed class action settlement is entitled to an attorneys' fee for his efforts. There was no discussion of *Serrano III* or *Lealao*.

Common Cause stands for the uncontroversial proposition that the common fund doctrine is available for the awarding of reasonable attorneys' fees to Class Counsel. The issue before the *Half* court, however, is not the availability of the common fund doctrine; it is how fees are to be determined within the context of the creation of a common fund.

8. The *Half* court's claim that *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224 [110 Cal.Rptr.2d 145] (6th App. Dist. July 31, 2001), supports its decision is incorrect.

> *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at p. 254* ["[c]ourts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method"].)

(*Half*, Ex. 1-10 at *31.)

Wershba does not address the issue of the *Serrano III* instruction on the primacy of the lodestar/multiplier approach.

Furthermore, the *Wershba* court was not relying on *Serrano III* in making this statement but rather on a misreading of *Chavez* (see Discussion, No. 6, pages 24-26, *supra*), as well as federal[11] jurisprudence (namely *Zucker v. Occidental Petroleum Corp., et al.*, 968 F.Supp. 1396, 1400 (C.D. Cal. June 4, 1997), cited in *Wershba* at 254), which is not relevant.

9. The *Half* court's claim that *Serrano III* supports its holding that the percentage-of-the-fund approach can be the first step in calculating a reasonable attorneys' fee is incorrect.

> The Supreme Court in *Serrano* even recognized the viability of the "percentage of the common fund" method....

Half, Ex. 1-10 at *31, footnote 8.

There is nothing in the entire footnoted 8 material about the percentage-of-the-recovery approach. The footnote recounts that *Serrano III* observed that the so-called common fund exception is grounded in equity. However, the availability of the common fund doctrine is a straw man issue. It is unrelated to the method to be used to calculate a reasonable attorneys' fee once it is determined that there is an entitlement to a fee awarded from a common fund.

10. The *Half* court's reference to *Fox v. Hale & Norcross Silver Mining Co.*, 108 Cal. 475 [41 P. 328] (Aug. 6, 1895):

> "First approved by this court in the early case of *Fox v. Hale & Norcross S. M. Co. (1895) 108 Cal.*

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[11] For a discussion of the *Half* court's improper reliance on federal attorneys' fee jurisprudence, see Discussion, No. 14, page 31, *infra*.

> *475 [41 P. 328]* ... , the 'common fund' exception has since been applied by the courts of this state in numerous cases. [Citations.]" (*Serrano v. Priest, supra, 20 Cal.3d at p. 35.*)

(*Half,* Ex. 1-10 at *31 n.8),

does not support its holding.

Fox v. Hale is a pre-*Serrano III* decision. There is no dispute that in 1895, California courts could base attorneys' fee awards (albeit not in class action common fund recoveries) using the percentage-of-the-fund approach. The issue is what was this Court's instruction in *Serrano III* about how reasonable attorneys' fee calculations must be made in future cases.

11. The *Half* court's reference to *Bell vs. Farmers Exchange,* 115 Cal.App.4th 715 [9 Cal.Rptr.3d 544] (1st App. Dist. Feb. 9, 2004):

> [S]ee *Bell v. Farmers Ins. Exchange (2004) 115 Cal.App.4th 715, 726 [9 Cal. Rptr. 3d 544]* ["the court awarded to [class] counsel attorney fees in the amount of 25 percent of the total damages fund recovered for the class"]....

(*Half,* Ex. 1-11 at *32),

does not support the *Half* court's holding. The quoted material is a citation to a statement by a trial court without any discussion of *Serrano III* or *Lealao*, or any of the other cases dealing with an award of reasonable attorneys' fees. Indeed, the quote from *Bell* is set out before there is any discussion of legal principles.

12. *Cundiff v. Verizon California, Inc.*, 167 Cal.App.4th 718 [84 Cal.Rptr.3d 377] (2d App. Dist. Oct. 16, 2008), does not support the *Half* court's holding:

> It therefore is appropriate for the trial court to cross-check an award of attorneys' fees calculated by one method against an award calculated by the other method in order to confirm whether the award is reasonable. (See ... *Cundiff v. Verizon California, Inc. (2008) 167 Cal.App.4th 718, 724 [84 Cal. Rptr. 3d 377]*....

(*Half*, Ex. 1-11 at *33.)

Cundiff held that there was no common fund created. The court did not award a fee by calculating a percentage of the recovery. *Cundiff* does not provide legal reasoning to support the *Half* court's holding.

13. *Sutter Health Uninsured Pricing Cases*, *supra*, 171 Cal.App.4th 495:

> The trial court followed a process similar to the one approved in *Sutter Health Uninsured Pricing Cases (2009) 171 Cal.App.4th 495 [89 Cal. Rptr. 3d 615]*. There, the Court of Appeal affirmed the trial court's order approving class counsel attorneys' fees as a percentage of a common fund after a lodestar "'cross-check to test the reasonableness of [the] amount.'" (*Id. at pp. 503, 512.*).... The trial court here did not abuse its discretion in performing a lodestar calculation ... to cross-check the percentage of fund award.

(*Half*, Ex. 1-11 at *35),

should not support the *Half* court's holding. The *Sutter* decision does not discuss *Serrano III* or *Lealao*. There is no claim that any

California appellate court decision supports the trial court's method. *Sutter* does not provide legal reasoning to support the *Half* court's holding.

14. Finally, federal law regarding the calculation of reasonable attorneys' fees is not relevant to this issue. It is a separate body of law with separate standards of class action attorneys' fee jurisprudence. The *Half* decision improperly relies directly on federal attorneys' fee jurisprudence, as well as citations to cases relying on federal attorneys' fee jurisprudence[12] to support its holding.

> [S]ee also *In re Bluetooth Headset Products Liability Litigation (9th Cir. 2011) 654 F.3d 935....; Shaffer v. Continental Cas. Co. (9th Cir. 2010) 362 Fed. Appx. 627, 632....; Vizcaino v. Microsoft Corp. (9th Cir. 2002) 290 F.3d 1043, 1050....*
>
> ....
>
> *Fischel v. Equitable Life Assur. Society of U.S. (9th Cir. 2002) 307 F.3d 997, 1006....*

(*Half*, Ex. 1-11 at *33 and *32, respectively.)

These federal cases are not being addressed in this Petition. They are not relevant to California reasonable attorneys' fee jurisprudence. The *Half* court's holding makes no attempt to establish that there is no California controlling precedent on the issue of the calculation of reasonable attorneys' fees.

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[12] *Chavez, supra,* cites *Shaw v. Toshiba* (see page 26, *supra*). *Apple Computer, supra,* cites to *Brytus v. Spang* (see page 24, *supra*). *Wershba, supra,* relied on *Zucker v. Occidental Petroleum* (see page 28, *supra*).

Ironically, on the issue of notice, the *Half* decision correctly states the necessary finding to support the use of federal law:

> California courts follow the federal rules for class action only in the absence of controlling state authority and only "look to *Rule 23* for guidance where California precedent is lacking."

(*Half*, Ex. 1-7 at *20; citations omitted.)

On the attorneys' fee issue, the *Half* court's decision ignores this essential criterion.

The *Half* court was not seeking to change California law and adopt federal practice. There is a whole body of California case law regarding class action attorneys' fee jurisprudence. There is no lack of California precedent. Federal authorities are irrelevant.

CONCLUSION

Because the *Half* decision has created further disagreement and confusion about the proper methodology under *Serrano III* for the awarding of reasonable attorneys' fees from class action common fund settlements, review by this Court is needed.

Dated: December 8, 2014.

Respectfully submitted,

Lawrence W. Schonbrun

Lawrence W. Schonbrun
Attorney for Plaintiff-Appellant and
Petitioner David Brennan

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the attached Petition for Review contains 7,238 words of proportionally spaced Times New Roman 14-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 Petition.

Dated: December 8, 2014

Lawrence W. Schonbrun

Lawrence W. Schonbrun
Attorney for Plaintiff-Appellant
and Petitioner David Brennan

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 December 8, 2014, I caused to be served a copy of the following document:

PETITION FOR REVIEW

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

Kevin T. Barnes, Esq.
Law Offices of Kevin T. Barnes
5670 Wilshire Blvd., Ste. 1460
Los Angeles, CA 90036
Tel: (323) 549-9100
Fax: (323) 549-0101
E-mail: Barnes@kbarnes.com
Attorneys for Plaintiffs

M. Kirby C. Wilcox, Esq.
Paul Hastings LLP
55 Second Street, 24th Fl.
San Francisco, CA 94105-3441
Tel: (415) 856-7000
Fax: (415) 856-7100
E-mail:
KirbyWilcox@paulhastings.com
Attorneys for Defendants

Barry M. Appell, Esq.
Mika M. Hilaire, Esq.
Appell, Hilaire, Benardo LLP
15233 Ventura Blvd., Ste. 420
Sherman Oaks, CA 91403
Tel: (818) 788-2300
Fax: (818) 788-2464
E-mail: Mika@ahblegal.com
Attorneys for Plaintiffs

Judith M. Kline, Esq.
Paul Hastings LLP
515 So. Flower St., 25th Fl.
Los Angeles, CA 90071
Tel: (213) 683-6000
Fax: (213) 627-0705
E-mail:
JudyKline@paulhastings.com
Attorneys for Defendants