NO. S222996

IN THE SUPREME COURT
OF THE STATE 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, Presiding Judge, Dept. 32

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# APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE IN SUPPORT OF HIS OPENING BRIEF ON THE MERITS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF LAWRENCE W. SCHONBRUN; [PROPOSED] ORDER

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*Attorney for Plaintiff Class Member/Objector and Appellant* David Brennan

# NO. S222996

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**OF THE STATE OF CALIFORNIA**

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APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE
IN SUPPORT OF HIS OPENING BRIEF ON THE MERITS;
MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATION OF LAWRENCE W. SCHONBRUN;
[PROPOSED] ORDER

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*Attorney for Plaintiff Class Member/Objector and Appellant* David Brennan

APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE
IN SUPPORT OF HIS OPENING BRIEF ON THE MERITS

NOTICE IS HEREBY GIVEN that pursuant to Rules 8.252(a), and 8.54(a) of the California Rules of Court, and California Evidence Code §§ 451(a), 452(a) and (d), 453, and 459(a), Appellant David Brennan requests that this Court take judicial notice of the following documents, copies of which are attached to the Declaration of Lawrence W. Schonbrun in support of this motion as Exhibits 1 through 3:

Exhibit 1: *Perdue v. Kenny A., et al.*, No. 08-970 (U.S. Supreme Court), Transcript of Oral Argument Oct. 14, 2009, excerpted pages 51:13-15, and 53:25 – 54:1. [Entire transcript is accessible at http://www.supremecourt.gov/oral_arguments/argument_transcript/2009.]

Exhibit 2: *Long v. Griffin, et al.*, No. 11-1021, 2014 Tex. LEXIS 304, at *6 [57 Tex. Sup. J. 470] (Supreme Ct., Tex., Apr. 25, 2014) (*per curium*).

Exhibit 3: *Levine v. The Entrust Group, Inc.*, No. C 12-03959, 2013 U.S. Dist. LEXIS 6715, at *6 (N.D. Cal. Jan. 15, 2013).

This Request for Judicial Notice is based on this Notice, the accompanying Memorandum of Points and Authorities, and the supporting Declaration of Lawrence W. Schonbrun with Exhibits 1 through 3.

Dated: July 21, 2015

Lawrence W. Schonbrun

Lawrence W. Schonbrun
Attorney for Plaintiff Class
Member/Objector and Appellant
David Brennan

MEMORANDUM OF POINTS AND AUTHORITIES

Evidence Code § 451(a), provides, in pertinent part:

> Judicial notice shall be taken of the following:
> (a) The decisional ... law of ... the United States....

Evidence Code § 452, provides, in pertinent part:

> Judicial notice may be taken of the following matters....:
> (a) The decisional ... law of any state of the United States....
> ....
> (d) Records of ... any court of record of the United States....

Evidence Code § 453:

> The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it....

Evidence Code § 459(a):

> The reviewing court may take judicial notice of any matter specified in Section 452.

Exhibit 1: *Perdue v. Kenny A., et al.*, No. 08-970 (U.S. Supreme Court), Transcript of Oral Argument Oct. 14, 2009, excerpted pages 51:13-15, and 53:25 – 54:1.
[Entire transcript is accessible at http://www.supremecourt.gov/oral_arguments/argument_transcript/2009.]

Authority: On appeal, this Court may take judicial notice of records of any court of record of the United States. California Evidence Code § 452(d).

Relevance: The comments by United States Supreme Court Justice Roberts are relevant to the issue of how a market determination of a reasonable attorneys' fee involves the client's ability to review the attorneys' bills for excess. Similar to the Chief Justice's reference to the scrutiny given by corporate general counsel, the class should be entitled to a similar scrutiny of their counsel's bills as well. See Exhibit 1-3, ls. 13-15 and Exhibit 1-4, l. 25 through Exhibit 1-5, l. 1, attached to Declaration of Lawrence W. Schonbrun; see also Appellant's Opening Brief on the Merits, p. 50.

Exhibit 2: *Long v. Griffin, et al.*, No. 11-1021, 2014 Tex. LEXIS 304, at *6 [57 Tex. Sup. J. 470] (Supreme Ct., Tex., Apr. 25, 2014).

Authority: On appeal, this Court may take judicial notice of the decisional law of any state of the United States. California Evidence Code § 459(a).

Relevance: This decision by the Supreme Court of Texas supports Appellant's argument regarding the level of detail currently required to be produced by attorneys in other jurisdictions who seek judicial awards of reasonable attorneys' fees when the fee award is to be calculated using the lodestar method. *Long, supra,* at *6 (Ex. 2-7); see also Appellant's Opening Brief on the Merits, p. 51.

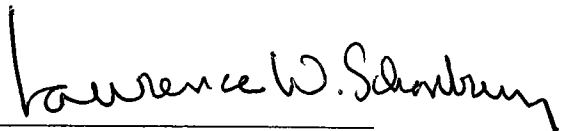
Exhibit 3: *Levine v. The Entrust Group, Inc.*, No. C 12-03959, at *6 2013 U.S. Dist. LEXIS 6715 (N.D. Cal. Jan. 15, 2013).

Authority: On appeal, this Court may take judicial notice of records of any court of record of the United States. California Evidence Code § 452(d).

Relevance: This opinion supports Appellant's argument that Class Counsel should not be negotiating for Defendant Robert Half's agreement regarding the amount of money to be taken from the class's common fund recovery as a reasonable attorneys' fee. *Levine, supra,* at *6 (Ex. 3-10); see also Appellant's Opening Brief on the Merits, pp. 56-57.

Dated: July 21, 2015

Respectfully submitted,



Lawrence W. Schonbrun
Attorney for Plaintiff Class
Member/Objector and Appellant
David Brennan

DECLARATION OF LAWRENCE W. SCHONBRUN IN SUPPORT OF APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE

I, Lawrence W. Schonbrun, declare:

1. I am an attorney duly admitted to practice before this Court. I have personal knowledge of the facts set forth herein and if called as a witness, I could competently testify to the matters stated therein.

2. I am the attorney of record for Plaintiff and Appellant David Brennan.

3. Appellant respectfully requests this Court to take judicial notice of the documents submitted herewith as Exhibits 1 through 3, attached hereto, which are true and correct copies of a partial transcript of an oral argument before the United States Supreme Court, a Texas state court decision, and a California federal court decision.

4. Exhibit 1, a partial transcript of the U.S. Supreme Court's oral argument in *Perdue v. Kenny A.*, No. 08-970 (Oct. 14, 2009), was not presented to the trial court or the court of appeal. It does not relate to proceedings occurring after the trial court's April 10, 2013, Order Granting Final Approval of Class Action Settlement and Judgment Thereon, which is the subject of review.

5. Exhibit 2, *Long v. Griffin, et al.*, No. 11-1021, 2014 Tex. LEXIS 304 [57 Tex. Sup. J. 470] (Supreme Ct., Tex., Apr. 25, 2014), is a published decision *per curium* of the Supreme Court of Texas. The decision was not presented to the trial court. The Los Angeles Superior Court, on April 10, 2013, issued its Order Granting Final Approval of Class Action Settlement and Judgment Thereon in *Laffitte v. Robert Half Int'l, Inc., et al.*, No. BC 321317 [related to Case Nos. BC 455499 and BC 377930]. *Long v. Griffin* was decided on April 25, 2014. Appellant could not request judicial notice of this decision from the trial court.

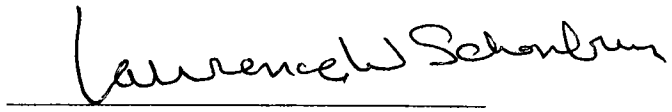
Appellant filed his Opening Brief before the Second District Court of Appeal in *Laffitte* on November 22, 2013. Appellant filed his Reply Brief in the Second District on February 28, 2014.

The Texas Supreme Court decision, *Long v. Griffin, et al.*, No. 11-1021, 2014 Tex. LEXIS 304 [57 Tex. Sup. J. 470] (Supreme Ct., Tex., Apr. 25, 2014), was presented to the Clerk of the Court of Appeal, Second Appellate District, Div. 7, in a letter dated June 24, 2014, citing *Long v. Griffin* as an additional authority and "relevant to the issue of the information needed for a court to employ the lodestar method to calculate a reasonable attorneys' fee."

6. Exhibit 3, *Levine v. Entrust Group, Inc.*, No. C 12-03595, 2013 U.S. Dist. LEXIS 6715 (N.D. Cal. Jan. 15, 2013), is a published decision of the United States District Court for the Northern District of California. This case was not presented to either the trial court or the court of appeal. It does not relate to proceedings occurring after the trial court's April 10, 2013, Order Granting Final Approval of Class Action Settlement and Judgment Thereon, which is the subject of review.

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

Executed on July 21, 2015, at Berkeley, California.



Lawrence W. Schonbrun, Declarant

# NO. S222996

**IN THE SUPREME COURT**
**OF THE STATE 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, Presiding Judge, Dept. 32

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## [PROPOSED] ORDER GRANTING JUDICIAL NOTICE

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Good cause appearing,

IT IS ORDERED that this Court shall take judicial notice of:

Exhibit 1, *Perdue v. Kenny A., et al.*, No. 08-970 (U.S. Supreme Court), Transcript of Oral Argument Oct. 14, 2009, excerpted pages 51:13-15, and 53:25 – 54:1;

Exhibit 2, *Long v. Griffin, et al.*, No. 11-1021, 2014 Tex. LEXIS 304 at *6 [57 Tex. Sup. J. 470] (Supreme Ct., Tex., Apr. 25, 2014) (*per curium*);

Exhibit 3, *Levine v. The Entrust Group, Inc.*, No. C 12-03959, 2013 U.S. Dist. LEXIS 6715, at *6 (N.D. Cal. Jan. 15, 2013).

attached to the Declaration of Lawrence W. Schonbrun supporting the motion for judicial notice filed by Plaintiff and Appellant David Brennan.

Dated:

Tani Cantil-Sakauye
Chief Justice

PROOF 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 July 21, 2015, I caused to be served a copy of the following document:

APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE IN SUPPORT OF HIS OPENING BRIEF ON THE MERITS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF LAWRENCE W. SCHONBRUN; [PROPOSED] ORDER

__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:

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Attorneys for Defendants

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

Executed on July 21, 2015, at Berkeley, California.

Sandra Norris

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - - x

SONNY PERDUE, GOVERNOR OF :

GEORGIA, ET AL., :

Petitioners :

v. : No. 08-970

KENNY A., BY HIS NEXT FRIEND :

LINDA WINN, ET AL. :

- - - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Wednesday, October 14, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

MARK H. COHEN, ESQ., Atlanta, Ga.; on behalf of the Petitioners.

PRATIK A. SHAH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

JUSTICE KENNEDY: All right.

MR. CLEMENT: There was still, though, I should say, something on the order of $750,000 in reimbursable expenses that had to be advanced. It's worth pointing out that one factor that Judge Shoob took into account in giving an enhancement here was the delay in payment. That is a permissible factor under Missouri v. Jenkins, and even if you use current rates, that doesn't do anything to compensate you for the delay in reimbursement of expenses.

CHIEF JUSTICE ROBERTS: Oh, I think it does. I think rates are set with -- based on a law firm's record of -- I mean, just because you bill a client doesn't mean that they are going to pay or that they are going to pay at what you billed them. And I think the rates are set to take into account that over the past year whatever you have a realization rate of -- whatever, 80 percent or 85 percent.

MR. CLEMENT: Oh, I was just making a narrow point, Mr. Chief Justice, which is the current rates don't take into account the fact that there was a delay in repayment for reimbursable expenses. Some of these expenses were paid out 4 years ago, I mean at the time of the fee calculation. You don't get sort of, you know, today's copying expenses or today's FedEx

I do want to get, before I sit down, this point about getting the incentives right, because one thing that Congress was clearly very concerned about was getting the incentive rights for counsel. And if you accept Petitioner's position that the lodestar is a ceiling and not something that is subject to adjustment up or down, then what you are telling lawyers is the that the maximum amount they can make in a civil rights case is the minimum amount they can make in a different case, where by the way they will get paid every 30 days and their expenses will get reimbursed in real time.

Then you are also telling them something else, which is, that's actually just a starter because there are multiple ways for district courts to cut down on the lodestar amount, either because you spent too much time on this or we didn't like your travel expenditures. And so there are multiple ways for those hours to be cut down.

If you accept Petitioner's rule and there is no way to get those rates bumped up in any circumstances, then you are basically guaranteeing that, as I say, the maximum you can make in a civil rights is the minimum you can make in any other kind of cases.

CHIEF JUSTICE ROBERTS: Well, but there -- general counsel do that all the time when they get a

bill from a law firm. They cut it down. They say you spent -- you've spent too much time with this associate only because he or she is a first-year associate and is learning and training; I'm not going to pay for that.

MR. CLEMENT: Two things, Mr. Chief --

CHIEF JUSTICE ROBERTS: So it's the same-- it's the same thing that happens when a district court looks at the -- the lodestar and cuts it down.

MR. CLEMENT: Two things, Mr. Chief Justice: One, it's the law of the Eleventh Circuit and I think every circuit that before submitting your fees to the court you are supposed to use billing judgment and take care of some of those things, approximating maybe what your client would do for you. But, second, and I think more tellingly, the client may do that to you. The client doesn't have the help of your opposing counsel to egg them on and give them suggestions, and that's what a district court does in the context of one of these cases.

So I really think, as a practical matter, you are systematically undercompensating counsel. And I mean, if you want to take into account practicalities, I am not here to reargue the Dague case, but if you want to talk about practicalities, the fact that all of these cases are contingency cases and the rational market for

FOCUS - 10 of 16 DOCUMENTS

# LARRY T. LONG, L. ALLAN LONG, AND B. VIRGINIA LONG, IN THEIR CAPACITIES AS TRUSTEES OF THE LAWRENCE ALLAN LONG TRUST, THE CHARLES EDWARD LONG TRUST, THE LARRY THOMAS LONG TRUST AND THE JOHN STEPHEN LONG TRUST D/B/A THE LONG TRUSTS, PETITIONERS, v. ROBERT M. GRIFFIN, ROBERT M. GRIFFIN, JR., CHARLES W. CONRAD, MARVIN OGILVIE, AND MARIE OGILVIE, RESPONDENTS

**NO. 11-1021**

**SUPREME COURT OF TEXAS**

***2014 Tex. LEXIS 304*; *57 Tex. Sup. J. 470***

**April 25, 2014, Opinion Delivered**

**NOTICE:**

PUBLICATION STATUS PENDING. CONSULT STATE RULES REGARDING PRECEDENTIAL VALUE.

**SUBSEQUENT HISTORY:** Released for Publication June 6, 2014.

**PRIOR HISTORY:** [*1]

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE TWELFTH DISTRICT OF TEXAS.

*Griffin v. Long, 2011 Tex. App. LEXIS 8910 (Tex. App. Tyler, Nov. 9, 2011)*

**COUNSEL:** For Larry T. Long, L. Allan Long and B. Virginia Long, in their capacities as Trustees of the Lawrence Allen Long Trust, the Charles Edward Long Trust, the Larry Thomas Long Trust and the John Steven Long Trust d/b/a the Long Trusts, Petitioner: F. Franklin Honea, The Law Offices of F., Franklin Honea, Dallas TX; Mike A. Hatchell, Locke Lord LLP, Austin TX; Ronny Lee Adkison, The Adkison Law Firm, Henderson TX; Thomas F. Loose, Locke Lord LLP, Dallas TX.

For Robert M. Griffin, Robert M. Griffin, Jr., Charles W. Conrad, Marvin Ogilvie and Marie Ogilvie, Respondent: Andrew George Khoury, Andrew G. Khoury, P.C., Longview TX; Rex A. Nichols, Nichols & Nichols, P.C., Longview TX.

**OPINION**

**PER CURIAM**

This appeal involves the evidence required to prove the reasonableness and necessity of attorney's fees under the lodestar method. The parties raise an additional issue regarding postjudgment interest we do not reach. This Court has made clear that a party choosing the lodestar method of proving attorney's fees must provide evidence of the time expended on specific tasks to enable the fact finder to meaningfully review the [*2] fee application. Here, the affidavit supporting the fee application generally stated the categories of tasks performed, but the application failed to include any evidence containing the requisite specificity. Accordingly, we reverse the court of appeals' judgment and remand to the trial court for a redetermination of attorney's fees.

Robert M. Griffin, Robert M. Griffin, Jr., Marvin and Marie Ogilvie, and Charles Conrad (collectively the "Griffins") sued Larry T. Long, L. Allan Long, and B. Virginia Long in their capacities as trustees of the Lawrence Allan Long Trust, the Charles Edward Long Trust, the Larry Thomas Long Trust, and the John Stephen Long Trust (collectively the "Long Trusts"). The Griffins' suit included several claims relating to their participation with the Long Trusts in certain oil and gas ventures. The key claim at issue here is the Griffins' assignment claim, which involved an agreement between the Griffins and the Long Trusts for the Griffins to pay a portion of drilling and operating costs in exchange for an assignment of a partial working interest in producing wells. The Griffins allege that the Long Trusts failed to assign the working interest due them under [*3] the

assignment agreements. In 2001, the Griffins' attorney filed an affidavit supporting the Griffins' request for attorney's fees. The affidavit indicated the Griffins' two attorneys spent 644.5 hours on the suit for a total fee of $100,000 based upon their hourly rates. Further, the affidavit segregated the time spent on each claim, with 30% spent on the assignment claim. But the affidavit indicated the assignment issue was inextricably intertwined with claims on which the attorneys spent 95% of their time.

Following a bench trial in 2003, the trial court largely ruled for the Griffins and awarded them $35,000 in attorney's fees. The court of appeals modified the judgment in several respects and affirmed it. *144 S.W.3d 99, 112.* We reversed the court of appeals' judgment in part. *222 S.W.3d 412, 417 (Tex. 2006).* We held that (1) under the assignment claim, because the assignment agreements did not comply with the Statute of Frauds, the agreements could not be enforced for future wells, and (2) the Griffins were not entitled to prevail on a separate claim involving a litigation agreement with the Long Trusts. *Id. at 416-17.* Because we modified the Griffins' recovery on appeal, we remanded [*4] for the trial court to redetermine the attorney's fee award. *Id. at 417.*

On remand, the trial court considered the affidavit on file and awarded the Griffins $30,000 in attorney's fees, with postjudgment interest to accrue from the date of that final judgment in 2009. The court of appeals found legally and factually sufficient evidence supporting the attorney's fee award but modified the judgment to accrue interest from the original, erroneous trial court judgment in 2003. S.W.3d , .

The Long Trusts petitioned this Court for review, asserting that (1) no legally sufficient evidence supports the amount of the attorney's fee award, and (2) postjudgment interest should accrue from the final judgment in 2009. Because we agree that no legally sufficient evidence supports the amount of the attorney's fee award, we do not reach the postjudgment interest issue. We remand for the trial court to redetermine the attorney's fee award.

Because the Griffins did not ultimately prevail on all of their assignment claim, the Long Trusts assert that no evidence supports the amount of the attorney's fee award. The Griffins respond that the assignment issue was inextricably intertwined with other [*5] issues in the case and that, even though it did not prevail on its declaratory judgment claim, the attorney's fee award was equitable and just under the Declaratory Judgment Act. Because the Griffins offered no evidence of the time expended on particular tasks, as we have required when a claimant elects to prove attorney's fees via the lodestar method, we agree with the Long Trusts that the Griffins did not provide the trial court with legally sufficient evidence to calculate a reasonable fee.

The Griffins brought two claims that could ultimately support an attorney's fee award. The Griffins' assignment issue included a claim for breach of an agreement, for which reasonable and necessary attorney's fees are recoverable under Texas Civil Practice and Remedies Code Chapter 38, subject to additional limitations. *TEX.CIV. PRAC.&REM.CODE § 38.001(8).* Also, the Griffins brought a claim under the Texas Uniform Declaratory Judgment Act, which allows trial courts to "award costs and reasonable and necessary attorney's fees as are equitable and just." *Id. § 37.009*; *see Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998).* Thus, under either their contract or declaratory judgment claim, the Griffins [*6] were required to prove the reasonableness and necessity of the attorney's fees the trial court awarded. *TEX.CIV. PRAC.&REM.CODE §§ 37.009, 38.001(8).*

The affidavit supporting the Griffins' request for attorney's fees used the lodestar method by relating the hours worked for each of the two attorneys multiplied by their hourly rates for a total fee. We explained in *El Apple I, Ltd. v. Olivas* that generalities about tasks performed provide insufficient information for the fact finder to meaningfully review whether the tasks and hours were reasonable and necessary under the lodestar method. *370 S.W.3d 757, 763 (Tex. 2012).* Sufficient evidence includes, at a minimum, evidence "of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *Id. at 764.* Because the testimony in *El Apple* only included the total number of hours worked and generalities about discovery and the length of trial, we remanded for a redetermination of attorney's fees. *Id. at 765.* We noted that contemporaneous records might be unavailable on remand and advised the attorneys to reconstruct their work to provide the trial court with the information [*7] to meaningfully review the fee request. *Id. at 764.*

Likewise, in *City of Laredo v. Montano*, we reversed and remanded to redetermine attorney's fees when the attorney testified to the time expended and the hourly rate but failed to provide evidence of the time devoted to specific tasks. *414 S.W.3d 731, 736-37 (Tex. 2013).*

Here, as in *El Apple* and *Montano*, the affidavit supporting the request for attorney's fees only offers generalities. It indicates that one attorney spent 300 hours on the case, another expended 344.50 hours, and the attorneys' respective hourly rates. The affidavit posits that the case involved extensive discovery, several pretrial hearings, multiple summary judgment motions, and a four and one-half day trial, and that litigating the matter

required understanding a related suit that settled after ten years of litigation. But no evidence accompanied the affidavit to inform the trial court the time spent on specific tasks. *See El Apple, 370 S.W.3d at 763*. The affidavit does claim that 30% of the aggregate time was expended on the assignment claim (part of which the Griffins prevailed on) and that the assignment issue was inextricably intertwined with matters that consumed [*8] 95% of the two attorneys' time on the matter. But without any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request. *Montano, 414 S.W.3d at 736-37*; *El Apple, 370 S.W.3d at 764*. We note that here, as in *El Apple*, contemporaneous evidence may not exist. But the attorneys may reconstruct their work to provide the trial court with sufficient information to allow the court to perform a meaningful review of the fee application. *El Apple, 370 S.W.3d at 764*.

In addition to the lodestar method, the attorney's fee affidavit also indicates the Griffins and their attorneys agreed to a 35% contingency fee arrangement, which the affidavit claims is reasonable and customary for such a suit. Even if supporting evidence is not required for the contingency fee method of proof (as it is for the lodestar method), the contingency fee method cannot support the trial court's fee award here because the final judgment awarded no monetary relief except for attorney's fees. Because the contingency fee method cannot support the trial court's fee award, and no legally sufficient evidence supports the award under the lodestar method, we [*9] remand to redetermine attorney's fees.

The Long Trusts also complain that the court of appeals erred in awarding postjudgment interest from the original, erroneous trial court judgment. Because we are remanding for the trial court to consider additional evidence of attorney's fees, we need not reach this issue. We are confident that, on remand, the lower courts will apply the principles we clarified in *Long v. Castle Texas Production Limited Partnership, 426 S.W.3d 73, 2014 Tex. LEXIS 252 (Tex. 2014)*, to properly assess the date from which postjudgment interest accrues.

In sum, under the lodestar method, no legally sufficient evidence supports the amount of attorney's fees the trial court awarded because no evidence indicates the time expended on the specific tasks for which attorney's fees may be recovered. Accordingly, pursuant to *Texas Rule of Appellate Procedure 59.1*, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand to the trial court for a redetermination of attorney's fees consistent with this opinion.

**OPINION DELIVERED: April 25, 2014**

LexisNexis®

**STANLEY LEVINE, Plaintiff, v. THE ENTRUST GROUP, INC., Defendant.**

**No. C 12-03959 WHA**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

***2013 U.S. Dist. LEXIS 6715***

**January 15, 2013, Decided**
**January 15, 2013, Filed**

**SUBSEQUENT HISTORY:** Later proceeding at *Levine v. Entrust Group, Inc., 2013 U.S. Dist. LEXIS 37207 (N.D. Cal., Mar. 15, 2013)*

**PRIOR HISTORY:** *Levine v. Entrust Group, 2012 U.S. Dist. LEXIS 173456 (N.D. Cal., Dec. 6, 2012)*

**COUNSEL:** [*1] For Stanley Levine, Charles Brissette, Sandra Brissette, Anita Dorio, and as trustee of the Virginia M. Wallace (deceased) IRA, Inheritance Trust, and Kyle V. Wallace (deceased) Decedent's Trust, Gary Dorio, Elias Zachos, Gerald Watts, Plaintiffs: David Keith Dorenfeld, LEAD ATTORNEY, Snyder & Dorenfeld LLP, Agoura Hills, CA; Lawrence Timothy Fisher, LEAD ATTORNEY, Bursor & Fisher, P.A., Walnut Creek, CA; Michael Winston Brown, LEAD ATTORNEY, Snyder Dorenfeld, Agoura Hills, CA; Cathy Jackson Lerman, PRO HAC VICE, Coral Springs, FL.

For Entrust Group, Inc., Entrust Administration, Inc., Defendants: Mark Eugene Terman, LEAD ATTORNEY, Pascal Benyamini, Drinker Biddle & Reath, LLP, Los Angeles, CA.

For Entrust New Direction IRA, Inc., n/k/a New Direction IRA, Inc., Defendant: Joseph J. De Hope, Jr., LEAD ATTORNEY, Kaufman, Dolowich, Voluck & Gonzo, LLP, San Francisco, CA.

For Entrust Arizona, LLC, n/k/a Vantage Retirement Plans, LLC, Defendant: Bevin Ann Berube, LEAD ATTORNEY, Slaughter Reagan, LLP, Ventura, CA; Kim Robert Maerowitz, PRO HAC VICE, Olivier A Beabeau, PRO HAC VICE, Galbut and Galbut, P.C., Phoenix, AZ.

**JUDGES:** WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** WILLIAM ALSUP

**OPINION**

**NOTICE REGARDING [*2] FACTORS TO BE EVALUATED FOR ANY PROPOSED CLASS SETTLEMENT**

For the guidance of counsel, please keep in mind the following factors that will typically be considered in determining whether to grant preliminary approval to a class settlement:

**1. ADEQUACY OF REPRESENTATION.**

Is the plaintiff an adequate representative with standing? Is plaintiff motivated to and qualified to act on behalf of those he or she seeks to represent? Are there shortcomings in the plaintiff that would be advanced to defeat a class certification motion? What is the litigation history, criminal history, and relationship to plaintiff's counsel? In an employment case, how long did the plaintiff work for the employer? The opinion of the lead plaintiff as to the fairness of the settlement to absent class members must be provided to the Court, along with an opinion by counsel. Adequacy of counsel is not a substitute for adequacy of the representative.

If a settlement proposal is made prior to formal class certification, there is a risk that the class claims have been discounted, at least in part, by the risk that class certification will be denied. All counsel should explain whether this risk was discussed and/or considered [*3] in the negotiations and, if so, why the rights of non-parties should be prejudiced merely because the

particular "representative" (or his or her counsel) might be deemed inadequate or other requirements of *Rule 23* might be unsatisfied.

**2. DUE DILIGENCE.**

Has class counsel performed due diligence (discovery and investigation) to learn the strength and best-case dollar amount of the class claim, including preparation of a final expert class damage report? Please remember that when one undertakes to act as a fiduciary on behalf of others (here, the proposed class), one must always perform adequate due diligence before acting.

**3. COST-BENEFIT FOR ABSENT CLASS MEMBERS.**

In the proposed settlement, what will absent class members give up versus what will they receive in exchange, *i.e.*, a cost-benefit analysis? If the recovery will be a full recovery, then much less will be required to justify the settlement than for a partial recovery, in which case the discount will have to be justified. This will require an analysis of the specific proof, such as a synopsis of any conflicting evidence on key fact points. It will also require a final class-wide damage study or a very good substitute, in sworn [*4] form. If little discovery has been done to see how strong the claim is, it will be hard to justify a discount on the mere generalized theory of "risks of litigation." A coupon settlement will rarely be approved. Where there are various subgroups within the class, what will be the plan of allocation of the settlement fund and why?

**4. THE RELEASE.**

The release should be limited only to the claims certified for class treatment. Language releasing claims that "could have been brought" is too vague. The specific statutory or common law claims to be released should be spelled out. Class counsel must justify the release as to each claim released, the probability of winning, and its estimated value if fully successful. Does the settlement contemplate that claims of absent class members will be released even for those whose class notice is returned as undeliverable? Usually, the Court will *not* extinguish claims of individuals known to have received no notice or whom received no benefit (and/or for whom there is no way to send them a settlement check). Put differently, usually the release must extend only to those who receive money for the release.

**5. EXPANSION OF THE CLASS.**

Typically, defendants [*5] vigorously oppose class certification and/or argue for a narrow class. In settling, however, defendants often seek to expand the class, either geographically (*i.e.*, nationwide) or claim-wise (including claims not in the complaint) or person-wise (*e.g.*, multiple new categories). Such expansions will be viewed with suspicion. If an expansion is to occur it must come with an adequate plaintiff and one with standing to represent the add-on scope and with an amended complaint, not to mention due diligence as to the expanded scope. The settlement dollars must be sufficient to cover the old scope plus the new scope. Personal and subject-matter jurisdiction over the new individuals to be compromised by the class judgment must be shown.

**6. REVERSIONS.**

A settlement that allows for a reversion of settlement funds to the defendant(s) is a red flag, for it runs the risk of an illusory settlement, especially when combined with a requirement to submit claims that may lead to a shortfall in claim submissions.

**7. CLAIM PROCEDURE.**

A settlement that imposes a claim procedure rather than cutting checks to class members for the appropriate amount may impose too much of a burden on class members, especially [*6] if the claim procedure is onerous, or the period for submitting is too short, or there is a likelihood of class members treating the notice envelope as junk mail. The best approach is to calculate settlement checks from defendant's records (plus due diligence performed by counsel) and to send the checks to the class members along with a notice that cashing the checks will be deemed acceptance of the release and all other terms of the settlement.

**8. ATTORNEY'S FEES.**

To avoid collusive settlements, the Court prefers that all settlements avoid any agreement as to attorney's fees and leave that to the judge. If the defense insists on an overall cap, then the Court will decide how much will go to the class and how much will go to counsel, just as in common fund cases. Please avoid agreement on any division, tentative or otherwise. A settlement whereby the attorney seems likely to obtain funds out of proportion to the benefit conferred on the class must be justified.

**9. DWINDLING OR MINIMAL ASSETS?**

If the defendant is broke or nearly so with no prospect of future rehabilitation, a steeper discount may be warranted. This must be proven. Counsel should normally verify a claim of poverty via a [*7] sworn record, thoroughly vetted.

**10. TIMING OF PROPOSED SETTLEMENT.**

In order to have a better record to evaluate the foregoing considerations, it is better to develop and to pre-

sent a proposed compromise *after* class certification, after diligent discovery on the merits, and after the damage study has been finalized. On the other hand, there will be some cases in which it will be acceptable to conserve resources and to propose a resolution sooner. For example, if the proposal will provide full recovery (or very close to full recovery) then there is little need for due diligence. The poorer the settlement, the more justification will be needed and that usually translates to *more* discovery and due diligence; otherwise, it is best to let non-parties fend for themselves rather than foist a poor settlement on them. Particularly when counsel proposes to compromise the potential claims of others in a low-percentage recovery, the Court will insist on detailed explanation of why the case has turned so weak, an explanation that usually must flow from discovery and due diligence, not merely generalized "risks of litigation." Counsel should remember that merely filing a putative class complaint does [*8] not authorize them to compromise the rights of absent parties. *If counsel believe settlement discussions should precede a class certification, a motion for appointment of interim class counsel must first be made.*

**11. A RIGHT TO OPT OUT IS NOT A CURE-ALL.**

A borderline settlement cannot be justified merely because class members may opt out if they wish. The Court has an independent duty to assess whether it is reasonable and adequate. Once the named parties reach a settlement in a purported class action, they are always solidly in favor of their own proposal. There is no advocate to critique the proposal on behalf of absent class members. That is one reason that *Rule 23(e)* insists that the district court vet all class settlements.

**12. INCENTIVE PAYMENTS.**

If the proposed settlement by itself is not good enough for the named plaintiff, why should it be good enough for absent class members similarly situated? Class litigation proceeded well for many decades before the advent of requests for "incentive payments," which too often are simply ways to make a collusive or poor settlement palatable to the named plaintiff. A request for an incentive payment is a red flag.

**13. NOTICE TO CLASS MEMBERS.**

Is [*9] the notice in plain English, plain Spanish, and/or plain Chinese (or the appropriate language)? Does it plainly lay out the salient points, which are mainly the foregoing points in this memorandum? Will the method of notice distribution really reach every class member? Will it likely be opened or tossed as junk mail? How can the envelope design enhance the chance of opening? Can notice be supplemented by e-mail notice?

* * *

Finally, for an order denying proposed preliminary approval, *see Kakani v. Oracle Corp., No. C 06-06493 WHA, 2007 U.S. Dist. LEXIS 47515, 2007 WL 1793774 (N.D. Cal. June 19, 2007).*

Dated: January 15, 2013.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE