
In the Court of Appeal of the State of California
Second Appellate District, Division p
No. B289717
PATRICK ECK, TYLER CHAPMAN, BRENDAN EISAN, AND
JUSTIN KRISTOPHER LE-ROY,
Plaintiffs-Respondents,
v.
CITY OF LOS ANGELES, et al.
Defendants-Respondents;

GREGORY S. RICH and MARGARET SCHISSEL,
Objectors-Appellants;
STEVEN YAGMAN,
Objector-Appellant;
CARMEN BALBER,
Objector-Appellant.

Appeal from the Superior Court of the State of California,
County of Los Angeles, Case No. BC577028 (consolidated with
BS153395 and BC383788)
Honorable Ann I. Jones, Judge Presiding

**MOTION TO DISMISS APPEALS; MEMORANDUM OF
POINTS AND AUTHORITIES; DECLARATION OF ERIC J.
BENINK; [PROPOSED] ORDER DISMISSING APPEALS**

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CERTIFICATE OF INTERESTED

ENTITIES OR PERSONS

These entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves:

None.

(Cal. Rules of Court, rule 8.208.)

Executed on August 27, 2018, at San Diego, California.

KRAUSE, KALFAYAN,
BENINK & SLAVENS, LLP



Eric J. Benink, Esq.
Attorneys for Plaintiffs-
Respondents Patrick Eck, Tyler
Chapman, Brendan Eisan and
Justin Kristopher Le-Roy

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MOTION TO DISMISS APPEALS

Pursuant to California Rules of Court 8.54 and 8.57, Plaintiffs-Respondents Patrick Eck, Tyler Chapman, Brendan Eisan, and Justin Kristopher Le-Roy move to dismiss the appeals of Objectors-Appellants Gregory S. Rich, Margaret Schissel, and Stephen Yagman (“Appellants”) on the grounds that Appellants lack standing to appeal because they were not parties to the case and failed to intervene in this class action. (See *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260 [“unnamed class members may not appeal a class judgment, settlement, or attorney fees award unless they intervene in the action.”].)

This motion is based on the attached memorandum of points and authorities and the Declaration of Eric J. Benink filed herewith.


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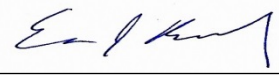
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The appeals of Objectors-Appellants Gregory S. Rich, Margaret Schissel, and Stephen Yagman (“Appellants”) should be dismissed because Appellants lack standing to appeal. On January 29, 2018, the California Supreme Court affirmed the rule that “unnamed class members may not appeal a class judgment, settlement, or attorney fees award unless they intervene in the action.” (See *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 262 (*Hernandez*)). None of the three Appellants intervened in this class action and therefore they lack standing to appeal.

BACKGROUND

Plaintiffs-Respondents Patrick Eck, Tyler Chapman, Brendan Eisan, and Justin Kristopher Le-Roy (“Plaintiffs”) alleged in this class action that defendants City of Los Angeles (“City”) through its Los Angeles Department of Water and Power (“LADWP”) (together as “Defendants”) included an 8% surcharge in LADWP’s electric rates in order to fund annual transfers to the City’s General Reserve Fund. Plaintiffs contended that the 8% surcharge was not approved by voters and thus, constituted an illegal tax under Proposition 26 (Cal. Const., art. XIII C, § 1, subd. (e)) and Proposition 218 (Cal. Const., art. XIII C, § 2.) Plaintiffs sought refunds and injunctive relief. (Declaration of Eric J. Benink, filed herewith (“Benink Decl.”) ¶ 2.)

On September 14, 2017, the trial court granted preliminary approval of a class action settlement with Defendants that

provided for the creation of a \$52 million Settlement Fund and future savings for ratepayers in the amount of \$243 million through Fiscal Year 2019-2020. (*Id.* ¶ 3.) After preliminary approval, a claims administrator provided notice of the proposed settlement to over 2 million potential class members through direct mailings, email, newspaper publications, and internet advertising. (*Id.* ¶ 4.) Following a fairness hearing on February 14, 2018, the trial court granted final approval of the settlement and awarded attorneys' fees, costs, and service awards. (*Id.* ¶ 4.) On February 26, 2018, the court entered an Order Granting Final Approval of Class Action Settlement ("Order") and the Final Judgment ("Judgment.") On February 28, 2018, Plaintiffs served the Notice of Entry of Final Judgment and Order Granting Final Approval of Class Action Settlement on all parties and objectors, including on Appellants. (*Id.* ¶ 5, Ex. B.)

On April 25, 2018, Yagman filed a Notice of Appeal from the Judgment. (*Id.* ¶ 7, Ex. D.) On April 27, 2018, Rich and Schissel jointly filed a Notice of Appeal from "an order after judgment" under Code of Civil Procedure § 904.1(a)(2). (*Id.* ¶ 7, Ex. E.) Based on their May 21, 2018 Case Information Statement, it appears that Rich and Schissel intended to appeal from the Judgment and Order, and not from any post-judgment order. (*Id.* ¶ 7, Ex. F.)

LEGAL STANDARD

Under California Code of Civil Procedure section 902, only a “party aggrieved” may appeal. This rule is jurisdictional. (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947.) Accordingly, if a party lacks standing to appeal, the Court “must disregard their contentions” (*id.*) and the party’s appeal must be dismissed. (See *Eggert v. Pacific States Savings & Loan Co.* (1942) 20 Cal.2d 199, 201 (*Eggert*).

ARGUMENT

Code of Civil Procedure section 902 establishes that “[a]ny party aggrieved’ may appeal.” On January 29, 2018, the California Supreme Court held that “unnamed class members may not appeal a class judgment, settlement, or attorney fees award unless they intervene in the action.” (*Hernandez, supra*, 4 Cal.5th at p. 262.) *Hernandez* did not espouse a new rule. Rather, it confirmed the rule set forth in *Eggert, supra*, 20 Cal.2d 199. *Eggert* held that unnamed class members lack standing to appeal because they are not “parties” within the meaning of California Code of Civil Procedure section 902 and thus, lack appellate standing. (*Eggert*, 20 Cal.2d at p. 201.) *Hernandez* explained that this intervention rule “promotes judicial economy by providing clear notice of a timely intent to challenge the class representative’s settlement” and “enables the trial court to review the motion to intervene in a timely manner.” (*Hernandez, supra*, 4 Cal.5th at p. 272.) *Hernandez* further stated that “an unnamed party to the action may also become a named party by filing an

appealable motion to set aside and vacate the class judgment under section 663” of the Code of Civil Procedure. (*Id.* at p. 267.)

Appellants never successfully intervened (or moved to intervene) or filed and served a motion to vacate pursuant to Code of Civil Procedure section 663 in the underlying action. (Benink Decl., ¶¶ 12, 13, Ex. L.) Thus, they are not aggrieved parties of record as required by Code of Civil Procedure section 902.

CONCLUSION

For the foregoing reasons, Plaintiffs-Respondents respectfully request that the Court dismiss Appellants' appeals based on a lack of standing.

Respectfully submitted,


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DECLARATION OF ERIC J. BENINK

I, Eric J. Benink, declare as follows:

1. I am one of the attorneys for Plaintiffs and Respondents Patrick Eck, Tyler Chapman, Brendan Eisan, and Justin Kristopher Le-Roy and the Class in the above-entitled action. I am duly admitted to practice law in the State of California. I have personal knowledge of the facts stated below and if called upon, I could and would testify competently thereto. I make this declaration in support of Plaintiffs-Respondents' Motion to Dismiss Appeals pursuant to California Rules of Court, Rules 8.54 and 8.57.

2. Plaintiffs alleged in this class action that defendants City of Los Angeles ("City") through its Los Angeles Department of Water and Power ("LADWP") (together as "Defendants") included an 8% surcharge in LADWP's electric rates in order to fund annual transfers to the City's General Reserve Fund. Plaintiffs contended that the 8% surcharge was not approved by voters and thus, constituted an illegal tax under Proposition 26 (Cal. Const., art. XIII C, § 1, subd. (e)) and Proposition 218 (Cal. Const., art. XIII C, § 2). Plaintiffs sought refunds and injunctive relief. Attached hereto as **Exhibit A** is a true and correct copy of the operative First Amended Consolidated Class Action Complaint filed on July 1, 2016.

3. On September 14, 2017, the trial court (Hon. Ann I. Jones) granted preliminary approval of a class action settlement between Plaintiffs and a settlement class and Defendants that provided for the creation of a \$52 million Settlement Fund and

future savings for ratepayers in the amount of \$243 million through Fiscal Year 2019-2020.

4. After preliminary approval, a claims administrator provided notice of the proposed settlement to over 2 million potential class members through direct mailings, email, newspaper publications, and internet advertising. Following a fairness hearing on February 14, 2018, the trial court granted final approval of the settlement and awarded attorneys' fees, costs, and service awards.

5. On February 26, 2018, the court entered an Order Granting Final Approval of Class Action Settlement ("Order") and the Final Judgment ("Judgment"). On February 28, 2018, Plaintiffs served Notice of Entry of Final Judgment and Order Granting Final Approval of Class Action Settlement on all parties and objectors, including on Appellants. Attached hereto as **Exhibit B** is a true and correct copy of the Notice, which attaches the Judgment and Order.

6. The names, addresses, and telephone numbers of all attorneys of record and unrepresented parties is set forth in **Exhibit C** attached hereto.

7. Appellant-Objector Yagman appeals from the Judgment and Order. Attached hereto as **Exhibit D** is a true and correct copy of Yagman's Notice of Appeal. Appellants-Objectors Rich and Schissel appeal from "an order after judgment." Attached hereto as **Exhibit E** is a true and correct copy of Rich and Schissel's Notice of Appeal. It appears based on their May 21, 2018 Case Information Statement, that Rich and Schissel intended to appeal from the Judgment and Order, and

not from any post-judgment order. Attached hereto as **Exhibit F** is a true and correct copy of the Case Information Statement.

8. On March 6, 2018, Objector Carmen Balber (Balber) filed a Motion to Vacate Final Judgment pursuant to Code of Civil Procedure section 663. Pursuant to California Rules of Court, Rule 8.108 subdivision (c)(2), Balber's motion extended the deadline to appeal from the judgment to 90 days after that motion was filed, to wit June 5, 2018.

9. On April 27, 2018, Balber filed a Notice of Appeal. Attached hereto as **Exhibit G** is a true and correct copy of Balber's Notice of Appeal.

10. Three separate appeals have been filed by four parties as follows: Yagman (April 25, 2018); Rich and Schissel (April 27, 2018) and Balber (April 27, 2018). Each notice of appeal was filed in the Los Angeles Superior Court.

11. On April 27, 2018, Balber filed her Appellant's Notice Designating Record on Appeal (by appendix under Rule 8.124). Attached hereto as **Exhibit H** is a true and correct copy of Balber's Notice Designating Record on Appeal. On May 23, 2018, Yagman filed his Notice Designating Record on Appeal (by appendix under Rule 8.124). Attached hereto as **Exhibit I** is a true and correct copy of Yagman's Notice Designating Record on Appeal. On June 12, 2018, Rich and Schissel filed their Appellant's Notice Designating Record on Appeal (by appendix under Rule 8.124). Attached hereto as **Exhibit J** is a true and correct copy of Rich and Schissel's Notice Designating Record on Appeal. On June 19, 2018, Plaintiffs/Respondents filed their Notice Designating Record on Appeal. Attached hereto as

Exhibit K is a true and correct copy of Plaintiffs/Respondents' Notice Designating Record on Appeal. On July 10, 2018, the Los Angeles Superior Court sent a Notice to Prepare Reporter's Transcript on Appeal. The record has not been prepared yet. There have been no requests to extend time to prepare the record.

12. Attached hereto as **Exhibit L** is a true and correct copy of the Register of Actions that my office obtained from the website of the Superior Court of California, County of Los Angeles in *Patrick Eck, et al. v. City of Los Angeles et al.*, Case No. BC577028 (consolidated with BC153395 and BC 583788) on August 20, 2018.

13. As the Register of Actions reflects, Yagman, Rich and Schissel (a) did not successfully intervene (and never filed a motion to intervene) in the underlying action and (b) did not file and serve a motion to vacate the judgment pursuant to Code of Civil Procedure section 663.

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

Executed on August 27, 2018 in San Diego, California,



Eric J. Benink

[PROPOSED] ORDER DISMISSING APPEALS

Good cause appearing, IT IS HEREBY ORDERED that Respondents' Motion to Dismiss Appeals is granted.

IT IS ORDERED that this Court shall dismiss the appeals of Objectors-Appellants Gregory S. Rich, Margaret Schissel, and Stephen Yagman (“Appellants”) on the grounds that Appellants lack standing to appeal because they were not parties to the case and failed to intervene in this class action.

Dated: _____

By: _____

Justice of the Court of Appeal

PROOF OF SERVICE

Patrick Eck, et al. v. City of Los Angeles
Second Appellate District, Division P
Case #B289717

I, Robin Griffin, declare as follows:

I am employed with the Law Office of Krause, Kalfayan, Benink & Slavens, LLP. My business address is: 550 W. “C” St., Ste. 530, San Diego, CA 92101; my electronic service address is rgriffin@kkbs-law.com; At the time of service, I was at least 18 years of age and not a party to this legal action.

On August 27, 2018, I filed the **Motion to Dismiss Appeals; Memorandum of Points and Authorities; Declaration of Eric J. Benink; [Proposed] Order Dismissing Appeals** with the California Court of Appeal, 2nd Appellate District, Division P (CRC, Rule 8.70) through the Court’s electronic filing system, TrueFiling.

I further declare this same day, I caused to be served the documents listed above by electronic service upon filing the documents through the Court’s electronic filing system, TrueFiling, and by UPS overnight mail upon:

SEE ATTACHED LIST

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

Dated: August 27, 2018



Robin Griffin

SERVICE LIST

Patrick Eck, et al. v. City of Los Angeles
Second Appellate District, Division P
Case #B289717

Party	Attorney
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