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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SUSAN HUFNAGLE, individually and n behalf of all others similarly situated,)	Case No. CV 10-08695 DDP (VBKx)
)	
Plaintiff,)	ORDER DENYING EX PARTE
)	APPLICATION FOR LEAVE TO FILE A
v.)	COMPLAINT IN INTERVENTION
)	
RINO INTERNATIONAL CORPORATION, DEJON ZOU, JENNY LIUE, BEN WANG, LI YU, KENNITH C. JOHNSON, JIANPING QIU, ZIE QUAN, and ZEJIN LI,)	[Docket Number 232]
)	
Defendants.)	

Presently before the court is an Ex Parte Application for Leave to File a Complaint in Intervention, filed by plaintiffs ("Derivative Plaintiffs") in a derivative action related to this matter.

I. Procedural Background

On April 9, 2012, Plaintiff in this action moved for preliminary approval of a class action settlement. (Dkt. No. 190). The court granted preliminary approval on May 21, 2012. (Dkt. No. 195). While Derivative Plaintiffs were not aware of the substance

1 of the settlement discussions in this case prior to Plaintiffs'
2 motion for preliminary approval, that motion revealed to Derivative
3 Plaintiffs the nature of the assets in issue in this case.

4 (Application at 7-8.)

5 On August 15, 2012, Plaintiffs moved for final approval of a
6 class action settlement and for attorney's fees. (Dkt. No. 198.)
7 By stipulation of the parties, that motion was set for a hearing on
8 December 17, 2012. (Dkt. Nos. 204, 206.)

9 On November 19, 2012, over three months after Plaintiffs filed
10 their motion for final settlement approval, Derivative Plaintiffs,
11 who were and remain non-parties to this case, attempted to file a
12 Motion for Attorney Fees. (Dkt. No. 216.) Derivative Plaintiff's
13 counsel was able to electronically file the motion only by
14 improperly and inaccurately listing named Plaintiff Susan Hufnagle
15 as the filer. In any event, the motion was filed incorrectly, and
16 stricken.

17 The non-party Derivative Plaintiffs subsequently filed several
18 more documents in this case, including another motion for attorney
19 fees, an ex parte application for relief from the court's order
20 striking Derivative Plaintiff's first improper filing, an ex parte
21 application to shorten time, and supporting declarations.
22 Derivative Plaintiffs did not file a motion to intervene in this
23 case. Thus, on December 11, 2012, the court vacated Derivative
24 Plaintiffs' pending motions, explicitly noting that Derivative
25 Plaintiffs' counsel is not counsel of record in this case.

26 On December 13, 2012, two business days before the hearing on
27 Plaintiffs' Motion for Final Settlement Approval, Derivative
28

1 Plaintiffs filed the instant Ex Parte Application for Leave to File
2 a Complaint in Intervention.

3
4 **II. Discussion**

5 Ex parte relief is generally disfavored when relief may be had
6 through a regularly noticed motion. It will be granted only upon
7 an adequate showing of good cause or irreparable injury to the
8 party seeking relief. Mission Power Eng'g Co. v. Cont'l Cas. Co.,
9 883 F.Supp. 488, 492 (C.D. Cal. 1995). As an initial matter, the
10 court notes that Derivative Plaintiffs here were aware of the
11 nature of the proposed settlement as early as April 2012, and no
12 later than November 19, 2012. Derivative Plaintiffs have made no
13 showing of good cause why they did not file a regularly noticed
14 motion to intervene.¹

15 As to the merits of Derivative Plaintiffs' application, courts
16 will grant a motion to intervene as of right where (1) the motion
17 is timely, (2) the applicant asserts "an interest relating to the
18 property or transaction which is the subject of the action," (3)
19 the disposition may impair the applicant's ability to protect her
20 interest, and (4) "the applicant's interest is not adequately
21 represented by the existing parties." McGough v. Covington Techs.
22 Co., 967 F.2d 1391, 1394 (9th Cir. 1992); Fed. R. Civ. P. 24(a).

23 Whether a motion to intervene is timely depends on (1) the
24 stage of the underlying proceeding, (2) the prejudice to other
25 parties, and (3) "the reason for and length of the delay." Id.

26 _____
27 ¹ Nor have Derivative Plaintiffs made any showing of
28 irreparable harm, except to the extent that they address harm in
discussing the merits of their application for leave to file a
complaint in intervention.

1 Here, all three factors weigh against finding Derivate Plaintiffs'
2 application timely. First, Derivative Plaintiffs bring this ex
3 parte application at the eleventh hour, a mere two days prior to a
4 final settlement approval hearing that is the product of over two
5 years of litigation and extensive settlement negotiations. The
6 possibility that intervention at this late date may disrupt a long-
7 discussed, otherwise agreed-upon settlement also bears upon the
8 prejudice to the parties to this suit.² See, e.g. Orange County v.
9 Air California, 799 F.2d 535, 538 (9th Cir. 1986); Aleut Corp. v.
10 Tyonek Native Corp., 725 F.2d 527, 530 (9th Cir. 1984).

11 Nor have Derivative Plaintiffs shown any compelling
12 explanation for their delay in seeking to intervene in this matter.
13 As discussed above, Derivative Plaintiffs have known about the
14 substance of the settlement proposal for over eight months. At the
15 very least, Derivative Plaintiffs could have sought to intervene on
16 November 19, 2012, but instead chose to improperly file motions in
17 this action without first seeking to become parties to it. This
18 court's relatively recently statement of the obvious, that
19 Derivative Plaintiffs' counsel is not counsel of record in this
20 case, does not explain, let alone justify, Derivative Plaintiffs'
21 lengthy delay. Accordingly, Derivative Plaintiffs' ex parte
22 application is untimely.³

23 _____
24 ² While the focus of this test is the prejudice to other
25 parties if intervention is allowed, the court also notes that the
26 parties here have also been prejudiced by Derivative Plaintiff's
27 attempt to intervene via a last minute ex parte application, which
28 gives the parties here little opportunity to oppose Derivative
Plaintiffs' intervention.

³ It is also unclear to the court whether disposition of this
case would impair Derivative Plaintiff's interests or whether those
(continued...)

1 **III. Conclusion**

2 For the reasons stated above, Derivative Plaintiffs' Ex Parte
3 Application for Leave to File Complaint in Intervention is DENIED.

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8 IT IS SO ORDERED.

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11 Dated: December 14, 2012


DEAN D. PREGERSON
United States District Judge

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26 ³(...continued)
27 interests are adequately represented. Derivative Plaintiffs'
28 proposed Complaint in Intervention makes no mention of any
potential harm to Derivative Plaintiffs, and seeks only
compensation to Derivative Plaintiffs' counsel as a matter of
equity and fairness.