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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

FOX HOLLOW OF TURLOCK OWNERS')
ASSOCIATION, et al.,)

Plaintiffs,)

vs.)

RICHARD SINCLAIR, et al.,)

Defendants.)

No. CV-F-03-5439 OWW/DLB

MEMORANDUM DECISION
CONDITIONALLY GRANTING
NEUMILLER & BEARDSLEE'S
MOTION TO WITHDRAW AS
COUNSEL FOR DEFENDANTS (Doc.
333); GRANTING IN PART AND
DENYING IN PART DEFENDANT
RICHARD SINCLAIR'S MOTION
FOR CONTINUANCE OF ALL
MATTERS UNTIL MARCH 21, 2010
AND FOR TRIAL POSTPONEMENT
(Doc. 340); DENYING WITHOUT
PREJUDICE PLAINTIFFS' MOTION
FOR LEAVE TO FILE
CONSOLIDATED AMENDED AND
SUPPLEMENTAL COMPLAINT (Doc.
336); AND DIRECTING
DEFENDANTS TO APPEAR ON
MONDAY, MARCH 1, 2010 AT
11:00 A.M. AND SHOW CAUSE
WHY THEY SHOULD NOT BE
REQUIRED TO ENGAGE COUNSEL
OF THEIR CHOICE

Before the Court is Neumiller & Beardslee's motion to
withdraw as counsel for Defendants, Defendant Richard Sinclair's

1 amended motion for continuance of all matters due to attorney
2 disability, and Plaintiffs' motion for leave to file a
3 consolidated amended and supplemental complaint. No appearance,
4 either personally or telephonically was made at the hearing by
5 Defendant Richard Sinclair or any of the other individual or
6 entity Defendants.

7 This case is a consolidation of three actions: An action
8 commenced by Plaintiff Fox Hollow of Turlock Homeowners'
9 Association against Richard Sinclair, Brandon Sinclair, Gregory
10 Mauchley, Lairtrust, LLC, Capstone, LLC, Mautrst, LLC, and
11 Stanley Flake as Trustee of Capstone Trust, Case No. CV-F-03-5439
12 OWW/DLB ("Fox Hollow Action"); an action commenced by California
13 Equity Management Group, Inc. against Mautrst LLC, Gregory
14 Mauchley, Diana Mauchley, Lairtrust LLC, Richard Sinclair,
15 Deborah Sinclair, Sinclair Enterprises, Inc., Capstone, LLC,
16 Brandon Sinclair, Stanley Flake, and Stanley Flake as Trustee of
17 the F. Hanse Trust and of the Julie Insurance Trust Case No. CV-
18 F-03-5774 OWW/DLB ("CEMG Action"); and an action commenced by
19 Lairtrust LLC, Mautrst LLC, and Capstone LLC against Fox Hollow
20 of Turlock Owners' Association, Andrew Katakis, and California
21 Equity Management Group, Inc. in the Stanislaus County Superior
22 Court, Case No. 322675 ("Lairtrust Action"), removed to this
23 Court and consolidated with the Fox Hollow and CEMG Actions by
24 Order filed on October 6, 2003 ("Consolidated Federal Actions").

25 Most of the Defendants in the Fox Hollow and CEMG Actions
26 commenced, as Plaintiffs, an action in the Stanislaus County

1 Superior Court, against Fox Hollow and CEMG, Case No. 332233 (the
2 "State Court Action"). This case was stayed to permit trial of
3 the state case with the expectation that the state case would
4 likely resolve the need for trial in the federal case. On August
5 18, 2009, the Superior Court issued a Statement of Decision,
6 finding for Defendants on the Fifth Amended Complaint and for
7 Cross-Defendants Richard Sinclair, Gregory Mauchley and Mauctrst
8 on the Cross-Complaint for abuse of process. Plaintiffs in the
9 State Court Action have filed an appeal, which is pending.

10 Plaintiffs' motion to file an amended complaint was filed on
11 January 8, 2010 as a counter-motion to the motion to withdraw as
12 counsel. Rule 230(c), Local Rules of Practice, provides:

13 Any counter-motion or other motion that a
14 party may desire to make that is related to
15 the general subject matter of the original
16 motion shall be served and filed in the
17 manner and on the date prescribed for the
18 filing of opposition. If a counter-motion or
19 other related motion is filed, the Court may
20 continue the hearing on the original and all
21 related motions so as to give all parties
22 reasonable opportunity to serve and file
23 oppositions and replies to all pending
24 motions.

25 Plaintiffs assert that the motion to amend is a counter-motion to
26 Neumiller's motion to withdraw because the motion to withdraw
"will directly impact Plaintiffs' ability to obtain leave to file
a Consolidated Amended and Supplemental Complaint as it
impermissibly contemplates leaving several of the entity
defendants without representation" and because Mr. Sinclair's
request for continuance requests that the current trial date be

1 postponed and the Counter-Motion "substantively address[es] any
2 adjustment of the schedule for this Action."

3 By opposition filed on January 19, 2010, Neumiller, acting
4 on behalf of Defendants, argues that the motion to amend is not a
5 counter-motion to Neumiller's motion to withdraw:

6 The entity defendants being without
7 representation following a granting of the
8 Motion for Leave to Withdraw could not
9 preclude Katakis and his entities, who are
10 represented by counsel, from filing a new
11 pleading with leave of court or otherwise
12 proceeding in this litigation. Second, the
13 fact that Mr. Sinclair filed an Ex Parte
14 Application for Continuance and Trial
15 Postponement does not present grounds for
16 Katakis to bring a counter-motion as against
17 the Motion for Leave to Withdraw, which is
18 distinct from the Ex Parte Application.
19 Third, and finally, the inclusion of a
20 proposed schedule adjustment in the Counter-
21 Motion is not sufficient to create a
22 relationship between the Counter-Motion on
23 the one hand and the Motion for Leave to
24 Withdraw and Ex Parte Application on the
25 other hand. The primary purpose of the
26 Counter-Motion is to obtain leave to file a
new pleading, and not to obtain a schedule
adjustment.

18 No opposition to the substantive merits of the motion to
19 amend has been filed. Neumiller is correct that the motion to
20 amend is not related or counter to the motion to withdraw, as it
21 addresses the continuing claims asserted while the withdrawal
22 motion concerns only the legal representation of the defendants.
23 Further, the briefing on the motion is not complete and, even if
24 Defendants had filed a substantive opposition to the motion to
25 amend, the reply brief would not be filed until the day of the
26 hearing. Richard Sinclair, who seeks to be substituted as

1 counsel, moves for a continuance of all matters until late March,
2 2010. Plaintiffs' motion to amend is DENIED WITHOUT PREJUDICE.
3 Plaintiffs may re-notice the motion for hearing on March 1, 2010
4 at 11:00 a.m.

5 On December 21, 2009, the law firm of Neumiller & Beardslee
6 ("Neumiller") filed a motion for leave to withdraw as counsel for
7 Defendants in the Consolidated Federal Actions. Neumiller's
8 motion is supported by the Declaration of Lisa Blanco Jimenez
9 that Defendants have breached their retainer agreement by failing
10 to pay fees and costs. (Doc. 333-3). Ms. Jimenez further avers:

11 3. Neumiller has been unable to make contact
12 with Richard Sinclair or Brandon Sinclair
13 since early November 2009, except through the
14 legal assistant to Richard Sinclair. It was
15 earlier agreed that Richard Sinclair, who is
16 a practicing attorney, would assume the
17 representations of all Defendants in this
18 case and on the appeal of Case No. 332233.
19 Thus, the recent inability to communicate
20 with Richard Sinclair has made it difficult
21 to continue with the representation of all
22 Defendants.

23 At the hearing, Ms. Jimenez represented that she has been unable
24 to communicate with any of the other individual Defendants or the
25 Entity Defendants.

26 The motion to withdraw was noticed for hearing on January
27 25, 2009. On January 12, 2009, Richard Sinclair lodged a
28 proposed Substitution of Attorney, substituting himself as
29 counsel of record in lieu of Neumiller & Beardslee. On January
30 14, 2010, Plaintiffs and Defendants Fox Hollow of Turlock Owners'
31 Association and California Equity Management Group, Inc., and

1 Defendant Andrew Katakis (collectively "Fox Hollow") filed an
2 opposition to the motion to withdraw, based on the assertion that
3 Richard Sinclair, although a licensed attorney, cannot represent
4 the entity defendants because of a potential conflict of
5 interest. The Order substituting Richard Sinclair as counsel of
6 record was signed and filed on January 15, 2010. (Doc. 347).
7 The Order substituting Richard Sinclair as counsel of record
8 lists only his name; none of the other Defendants are listed.
9 The Order substituting Richard Sinclair as counsel of record was
10 vacated by Order filed on January 19, 2010 because of Fox
11 Hollow's objections to Neumiller's motion to withdraw.

12 Fox Hollow opposes Neumiller's motion to withdraw. Fox
13 Hollow asserts that granting Neumiller's motion will leave the
14 Entity Defendants, Lairtrust, LLC, Capstone, LLC, Mauctrst LLC,
15 and Sinclair Enterprises, without representation. Richard
16 Sinclair, who is a licensed attorney, cannot represent the Entity
17 Defendants, Fox Hollow contends, because he was involved in the
18 formation of Fox Hollow and previously represented Fox Hollow,
19 that are now adverse parties, and because of the potential for a
20 conflict of interest between Mr. Sinclair and the Entity
21 Defendants.

22 Neumiller correctly responds that the prohibition on
23 corporate self-representation does not preclude the granting of a
24 motion to withdraw. See *Vang v. Home Loan Funding, Inc.*, 2008 WL
25 3286825 (E.D.Cal.2008), ruling that an attorney may be allowed to
26 withdraw without offending the rule against corporate self-

1 representation, citing *Ferruzzo v. C. & D. Enterprises, Inc.*, 104
2 Cal.App.3d 501, 504 (1980).

3 As to Fox Hollow's contention that the motion to withdraw be
4 denied because of Mr. Sinclair's conflicts of interest, Neumiller
5 asserts that Fox Hollow has put the cart before the horse because
6 neither Neumiller nor any other party has yet to seek to
7 substitute Mr. Sinclair as counsel for the other Defendants.

8 Neumiller's assertion is belied by Ms. Jimenez's declaration
9 in which she avers that Neumiller intended to substitute Mr.
10 Sinclair as counsel for all Defendants. Neither Neumiller nor
11 Mr. Sinclair respond to Fox Hollow's contentions that Mr.
12 Sinclair cannot represent the Entity Defendants in this action.

13 Neumiller's motion to withdraw as counsel for Defendants is
14 GRANTED on the conditions that (1) the Entity Defendants obtain
15 counsel other than Richard Sinclair within 30 days.

16 On January 12, 2010, Richard Sinclair filed an amended ex
17 parte application for continuance of all matters due to his
18 physical disability until March 21, 2010 and for trial
19 postponement. This motion was filed before the January 15, 2010
20 Order substituting Mr. Sinclair as counsel (and, of course,
21 before the January 15, 2010 Order was vacated).

22 Fox Hollow objects to Mr. Sinclair's application, in part
23 because Mr. Sinclair filed the application prior to being
24 substituted as counsel of record by the Court.

25 Mr. Sinclair avers:

26 3. Neumiller & Beardslee is seeking to be

1 relieved as counsel and I will be becoming
2 counsel or an associate counsel of record
once new counsel is obtained.

3 4. I am filing concurrently herewith a
4 Substitution of Attorney for myself replacing
5 Neumiller & Beardslee, making me attorney of
6 record in pro per. Once I am no longer
disabled, it is my intention to file
Substitution of Attorney replacing Neumiller
& Beardslee for the remainder of my clients.

7 5. Attached ... as Exhibit 'A' is a letter
8 from one of my doctors, dated November 6,
2009, from Dr. Upinder Basi, M.D. On the
9 advice of my doctors, I was originally unable
10 to practice law for 90 days until after
February 6, 2010, while they sought to
resolve my disability.

11 6. On November 30, 2009, two cervical disks
12 were removed from my neck and bone grafts
13 were set to replace the disks and metal
plates were screwed in place. This was done
to prevent quadraplegia.

14 7. There is still damage to my spinal cord
15 which is healing, slowly. I am heavily
16 medicated, taking, among other medications,
Hydrocodone 10-325's, 1-2 every 3 hours plus
17 muscle relaxers. This impedes my ability to
concentrate.

18 8. All Counsels are aware of this disability
19 and the State Court matters and Appellate
20 Court matters involving many of these same
parties and this subject matter have been
21 stayed until 2 weeks after the 6th of
February, 2010 ... It is inappropriate for
22 counsel to pursue matters knowing that I am
unable to protect my interests and the
interests of my clients.

23 9. On January 7, 2010, I obtained new x-rays
24 of my neck and spinal column and met with my
surgeon, Dr. Alexander Davis, to review the
25 progress of the replacement cadaver 'cervical
disks.' He has again objected to the
26 continued court stress of my work during the
healing process. He has extended my
restrictions from the sixth of February, 2010

1 to the 1st of March, 2010 ... I will
2 thereafter need approximately three weeks to
3 prepare substitutions, and get up to speed in
4 this and the balance of my calendar.

5 10. I request this Court to postpone the
6 trial date so that I will have time to
7 complete my disability and get up to trial
8 speed as counsel in pro per and to become or
9 obtain counsel for the rest of my clients to
10 replace Neumiller and Beardslee. I also
11 request the Court to postpone all matters
12 herein until after the 21st of March, 2010,
13 to give my time to recuperate and catch up.
14 My office had previously asked counsel of
15 record to make these requests and apprise the
16 Court.

17 Attached to Mr. Sinclair's declaration as Exhibit A is a letter
18 dated November 6, 2009 from Dr. Basi:

19 Mr. Sinclair suffers from a significant
20 medical condition, which at this time
21 prevents him from being physically active.

22 He is unable to stand, sit and walk without
23 great difficulty. We would ask that he be
24 excused from activities related to his
25 profession for a period of 90 days.

26 Attached as Exhibit C is an "Excuse Slip" dated January 8, 2010
signed by Dr. Davis which states: "Patient will be out of work
until 3-1-2010 due to recovering from his recent cervical spine
surgery."

Fox Hollow objects to the substitution of Mr. Sinclair as
counsel of record and to his request for continuance of scheduled
dates.

Fox Hollow argues that Mr. Sinclair is precluded by the
California Rules of Professional Conduct from substituting in as
counsel of record when he is disabled. Fox Hollow cites

1 California Rule of Professional Conduct 3-700:

2 Rule 3-700 Termination of Employment

3 ...

4 (B) Mandatory Withdrawal.

5 A member representing a client before a
6 tribunal shall withdraw from employment with
7 the permission of the tribunal, if required
8 by its rules, and a member representing a
9 client in other matters shall withdraw from
10 employment, if:

11 ...

12 (3) The member's mental or physical
13 condition renders it unreasonably difficult
14 to carry out the employment effectively.

15 Fox Hollow argues that Mr. Sinclair "is not in a position to
16 assert that he is not suffering from such a mental or physical
17 condition since he is using that very condition as the basis for
18 seeking to postpone all dates in the present case for at least
19 two (2) months."

20 Neumiller replies that Fox Hollow's contention that Mr.
21 Sinclair cannot represent himself *in pro per* because of his
22 present disability is "bizarre."

23 Given the unchallenged grounds for the withdrawal of
24 Neumiller, i.e., failure to pay fees and inability to contact and
25 communicate with Mr. Sinclair and the other defendants, the fact
26 that Mr. Sinclair is temporarily disabled does not, of itself,
preclude him from representing himself *in pro per*. Further,
California Rules of Court 3.1332(c) (2) & (3) provides that,
although continuances of trials are disfavored, circumstances,

1 such as the illness of a party or trial counsel may indicate good
2 cause. If Mr. Sinclair's disability persists, there may come a
3 point where the case will have to be resolved notwithstanding his
4 physical problem, despite the delays that have occurred in this
5 case.

6 Fox Hollow argues that the substitution of Mr. Sinclair as
7 counsel should be denied because "it is clearly made for the
8 purpose of delay." Fox Hollow cites *Fritz v. Spalding*, 682 F.2d
9 783 (9th Cir.1982), as authority that the Court may deny the
10 substitution of Mr. Sinclair as counsel of record on the basis of
11 delay.

12 *Fritz* involved an appeal from the denial petition for writ
13 of habeas corpus based on the petitioner's claim that his
14 constitutional rights were violated when his motion to represent
15 himself in the criminal proceeding below was denied. The trial
16 court had denied the motion for self-representation, finding it
17 to be a tactic for delay. The Ninth Circuit discussed the
18 grounds for denial of a motion for self-representation, ruling
19 that delay per se is not a sufficient ground for denial of the
20 constitutional right of self-representation; that a defendant may
21 have bona fide reasons for not asserting his constitutional right
22 until the day of trial; and that he may not be deprived of that
23 right absent an affirmative showing of purpose to secure delay.
24 682 F.2d at 784.

25 Relying on *Fritz*, Fox Hollow argues that the coupling of the
26 substitution of attorney filed by Mr. Sinclair with his motion

1 for continuance is "strong evidence of a purpose to delay."

2 *Fritz* and the constitutional right to self-representation in
3 criminal cases has doubtful application to Mr. Sinclair's
4 substitution and his request for continuance. Neumiller cannot
5 be forced to remain as counsel of record for Mr. Sinclair and the
6 other defendants solely because the substitution will result in
7 delay. Moreover, unless Fox Hollow has evidence that Mr.
8 Sinclair and his doctors are lying, he has a serious medical
9 condition that necessitates the continuance. While Fox Hollow is
10 concerned that Mr. Sinclair will keep returning to seek
11 additional continuances, that will be dealt with if and when it
12 occurs.

13 Richard Sinclair's motion for continuance is GRANTED to
14 March 1, 2010. Richard Sinclair and the other individual
15 defendants are ordered to appear, either personally or
16 telephonically, on Monday, March 1, 2010. The individual
17 defendants must show cause why they should not be required to
18 engage counsel of their choice to represent them and why a firm
19 schedule for resolution of this action adopted. All parties
20 presently represented by Neumiller are hereby ordered to respond
21 to communications to them from Neumiller involving this action.

22 Counsel for Fox Hollow of Turlock Owners' Association, Greg
23 Durbin, shall prepare and lodge a form of order consistent with
24 this Memorandum Decision within five (5) court days following
25 service of this Memorandum Decision.

26 ///

1 IT IS SO ORDERED.

2 **Dated: February 5, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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