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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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RONALD C. EVANS, an individual;
JOAN M. EVANS, an individual;
DENNIS TREADAWAY, an individual;
and all others similarly
situated

Plaintiffs,

v.

ZB, N.A., a National Banking
Association, dba California Bank
& Trust

Defendant.

No. 2:17-cv-01123-WBS-DB

MEMORANDUM AND ORDER RE:
MOTION TO BE DESIGNATED AS
INTERIM CLASS COUNSEL

ZIONS BANCORPORATION, N.A., a
National Banking Association,
formerly known as ZB, N.A., dba
California Bank & Trust,

Third-Party Plaintiff,

v.

JTS COMMUNITIES, INC., a
California Corporation; LARRY A.
CARTER, an individual; JACK T.
SWEIGART, an individual; and
BRISTOL INSURANCE COMPANY, a
dissolved Utah corporation; and
ROES 1-20 inclusive,

1 Third-Party Defendant.
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6 Plaintiffs, as putative class representatives, allege
7 that the defendant CB & T Bank (formerly known as Zions
8 Bancorporation, N.A.) ("defendant" or "CB & T") knowingly aided
9 and abetted a Ponzi scheme perpetrated by Deepal Wannakuwatte
10 ("Wannakuwatte") while using his company International
11 Manufacturing Group, Inc. ("IMG") to defraud investors. (First
12 Amended Complaint ("FAC") (Docket No. 42).) Before the court is
13 plaintiffs' motion to have Robert L. Brace and Michael P. Denver
14 designated as interim class counsel. ("Mot. To Be Designated as
15 Interim Class Counsel") (Docket No. 71).

16 I. Discussion¹

17 Federal Rule of Civil Procedure 23(g) (3) provides that
18 "the court may designate interim counsel to act on behalf of a
19 putative class before determining whether to certify the action
20 as a class action." Fed. R. Civ. P. 23(g) (3). The court may do
21 so "if necessary to protect the interests of the putative class."
22 Fed. R. Civ. P. 23, advisory committee's notes. In some cases,
23 "there may be rivalry or uncertainty that makes formal
24 designation of interim counsel appropriate." Id. The advisory

25
26 ¹ The court previously recited the factual and procedural
27 background in depth in its order granting defendants' motions to
28 dismiss. (See Order Granting Motion to Dismiss at 1-5 (Docket
No. 50).) Accordingly, the court will refrain from doing so
again.

1 committee notes contemplate that interim counsel may be necessary
2 to ensure that one attorney or firm is responsible for "tak[ing]
3 action to prepare for the certification decision, can "make or
4 respond to motions before certification", and so that
5 "[s]ettlement may be discussed before certification." Id.

6 Plaintiffs contend that the appointment of Brace and
7 Denver as interim class counsel is permitted under Federal Rule
8 of Civil Procedure 23(g) (3) and necessary to protect the putative
9 class. (Mot. To Be Designated as Interim Class Counsel at 6.)
10 However, none of the factors contemplated by the Rule 23 advisory
11 committee's notes to justify appointing interim counsel appear to
12 apply here. There is no rivalry here among competing law firms
13 to represent the putative class. See In re Seagate Tech. LLC
14 Litig., No. 16-cv-00523-RMW, 2016 WL 3401989, at *3 (N. D. Cal
15 June 21, 2016) (denying appointment of interim counsel because
16 "this case does not involve competing lawsuits pending in
17 district court that may be consolidated in the near future, nor
18 is there a gaggle of firms jockeying to be appointed class
19 counsel.") Indeed, Brace and Denver have represented the named
20 plaintiffs and putative class since the complaint was filed in
21 2017. (See Compl. at 1.) Brace and Denver have proven to be
22 perfectly able to make and respond to motions in this case.

23 Plaintiffs additionally argue that the appointment of
24 Brace and Denver as interim class counsel is needed to prevent
25 defendant from unfairly using depositions of class members in the
26 related JTS litigation in state court to defeat asserted class
27 claims in this action. (Mot. To Be Designated as Interim Class
28 Counsel at 3.) However, that argument has been rendered moot.

1 Following the parties' status conference on September 28, 2020,
2 defendant has agreed to (i) permit the use in the present case of
3 all discovery taken in the JTS state court action, (ii) to
4 produce to plaintiffs in this action all documents that they have
5 produced in the JTS action, and (iii) permit plaintiffs' counsel
6 to attend depositions in the JTS action. (Opp'n. to Mot. at 7.)

7 Plaintiffs also claim that appointing Brace and Denver
8 as interim class counsel will assist in settling the case. (Mot.
9 To Be Designated as Interim Class Counsel at 5.) However, the
10 parties have already retained a mediator and participated in a
11 full day of mediation on August 17, 2020. (Opp'n. to Pls.' Mot.
12 to Be Designated as Interim Counsel (Docket No. 77) at 6). Thus,
13 it does not appear that interim class certification is necessary
14 to facilitate settlement talks between the parties.

15 For the first time on reply, plaintiffs contend that if
16 Brace and Denver are not appointed as interim class counsel, they
17 will be barred from contacting other putative class members and
18 being present at or representing them during their depositions.
19 (See Reply Br. in Supp. of Mot. at 8 ("Reply") (Docket No. 79).)
20 They base this contention on Rule 7.3 of the California Rules of
21 Professional Conduct. That rule provides that lawyers shall not
22 "by in-person, live telephone, or real-time electronic contact
23 solicit professional employment when a significant motive for
24 doing so is the lawyer's pecuniary gain, unless the person
25 contacted: 1) is a lawyer or 2) has a family, close personal, or
26 prior professional relationship with the lawyer." Cal. Rules of
27 Prof'l Conduct R. 7.3(a).

28 Not only was this argument waived because it was raised

1 for the first time in plaintiffs' reply brief, see Bazuaye v.
2 INS, 79 F.3d 118, 120 (9th Cir. 1996), the argument is also
3 unpersuasive. Plaintiffs have not convinced the court that
4 contacting putative class members by telephone regarding their
5 deposition would constitute solicitation for professional
6 employment motivated by pecuniary gain. Plaintiffs have cited no
7 case law to support their contention. Moreover, Rule 7.3 of the
8 California Rules of Professional Conduct does not appear to apply
9 to merely contacting and coordinating with putative class members
10 by letters or emails. In short, because plaintiffs have not
11 demonstrated that contacting the putative class members in the
12 way contemplated would violate the California Rules of
13 Professional Conduct, the court will not assume that it will.

14 Accordingly, the court finds that none of plaintiffs'
15 arguments weigh in favor of appointing interim counsel. Denying
16 the appointment of interim class counsel will not prejudice the
17 putative class in any way. "Failure to make the formal
18 designation does not prevent the attorney who filed the action
19 from proceeding in it. Whether or not formally designated
20 interim counsel, an attorney who acts on behalf of the class
21 before certification must act in the best interests of the class
22 as a whole." Fed. R. Civ. P. 23, advisory committee's notes. In
23 the absence of special circumstances warranting appointment of
24 interim class counsel, the court will wait to consider the
25 adequacy of representation and appointment of class counsel until
26 such time as plaintiffs move for class certification.

27 IT IS THEREFORE ORDERED that plaintiffs' motion to
28 appoint Robert L. Brace and Michael P. Denver as interim class

1 counsel (Docket No. 71) be, and the same hereby is, DENIED.

2 Dated: November 5, 2020



3 WILLIAM B. SHUBB
4 UNITED STATES DISTRICT JUDGE

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