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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SETH LONG,  
Plaintiff,  
  
v.  
  
GRACO CHILDREN'S PRODUCTS INC.,  
et al.,  
  
Defendants.

Case No. [13-cv-01257-JD](#)

**ORDER RE OSC AND REFERRAL TO  
COMMITTEE ON PROFESSIONAL  
CONDUCT**

Re: Dkt. No. 130

United States District Court  
Northern District of California

This case is a consumer class action for deceptive practices and other claims arising out of the sale of defective car seats for infants and children. On July 7, 2015, the Court issued an Order to Show Cause (“OSC”) why sanctions should not be imposed on defendants Graco Children’s Products Inc. and Newell Rubbermaid Inc. (collectively “Graco”) and their counsel, Yakov Wiegmann and Joseph Krasovec of the law firm Schiff Harding LLP, for arguments made in their motion to dismiss this case. The gravamen of the Court’s concern is that Graco and its lawyers played fast and loose with the facts in seeking to dismiss this case. They devoted a substantial portion of their motion to dismiss to arguing that the claims for damages in the complaint -- on behalf of the named plaintiff and the putative class -- were moot because Graco offered full purchase price refunds to purchasers of the car seats in a national product recall campaign. Dkt. No. 104. Specifically, Graco and its lawyers argued, under headings such as “All Claims for Monetary Relief Are Mooted by the Recall,” that purchasers were offered “*full relief . . . including a full refund of their purchase price upon return of the product.*” *Id.* at 10 (emphases in original). They stated that the “highest loss any putative class member could have experienced would consist of the full price of the seat the customer purchased and any expenses he or she incurred in attempting to clean and/or repair a QT buckle” and that “[u]nder the recall . . . relief is offered now,

1 without delay, without uncertainty, and without a reduction of consumers’ recoveries in the form  
2 of plaintiff’s attorneys’ fees.” *Id.* at 10-11. The whole theme of the dismissal argument made to  
3 the Court was that “the recall provides all compensatory and injunctive relief Plaintiff purports to  
4 demand, and that relief is being provided now, without the need for a class trial.” *Id.* at 14.  
5 Graco’s counsel pressed these same points at oral argument on the motion.

6 The Court denied the motion and found that Graco and its counsel failed to support these  
7 representations with facts. As the Court stated in the order denying dismissal, “[n]one of the recall  
8 documents say anything at all about a refund of any sort, let alone offer a full refund as a standard  
9 part of the recall program.” Dkt. No. 120 at 6. The Court also found that Graco’s representation  
10 that it offered full refunds in the recall was simply “not true” in light of the documents Graco itself  
11 proffered. *Id.* Several months after entry of the order denying dismissal, plaintiff filed a motion  
12 for class certification that contained excerpts of a deposition of a Graco employee that casts even  
13 more doubt on the truthfulness and accuracy of Graco’s full refund representations. Dkt. No. 129.  
14 This new evidence, combined with the Court’s prior findings about Graco’s questionable  
15 representations, led to the OSC.

16 The Court has serious concerns about the litigation tactics Graco and its lawyers have  
17 pursued. The thrust of the motion to dismiss was that the Court should dismiss this case with  
18 prejudice because everyone in the putative class could easily get a full purchase price refund. That  
19 proposition, however, is without evidentiary support, and the record presented to the Court so far  
20 strongly indicates that it is, at best, a gross and unwarranted exaggeration. In response to the OSC,  
21 Graco says that it never expressly misrepresented that full refunds were the primary remedy  
22 offered or that all consumers automatically got one. Dkt. No. 131. It is true that Graco and  
23 counsel were artful enough in the dismissal motion to mention other forms of relief such as a  
24 replacement buckle in proximity to the full refund representations. *See, e.g.*, Dkt. No. 104 at 10.  
25 But that is precisely the conduct that concerns the Court. It is clear from the record that Graco  
26 greatly exaggerated the availability and practice of offering full refunds to purchasers in the recall  
27 drive to persuade the Court to terminate this litigation. The fact that Graco strategically laced its  
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1 arguments with threads of truth does not justify or excuse the substantial and misleading  
2 overstatements about the refunds.

3 Our District’s Local Rules set the standards expected of counsel authorized to practice  
4 before its courts. Civil Local Rule 11-4(a) requires attorneys to practice with the honesty, care,  
5 and decorum required for the fair and efficient administration of justice. The rule adopts the State  
6 Bar Act, the Rules of Professional Conduct of the State Bar of California and applicable court  
7 decisions as the standards of professional conduct in this district. Under the State Bar Act, an  
8 attorney may only use arguments and methods that “are consistent with truth, and [may] never  
9 seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”  
10 Cal. Bus. & Prof. Code § 6068(d). And under the Rules of Professional Conduct, “[i]n presenting  
11 a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes  
12 confided to the member such means only as are consistent with truth; (B) Shall not seek to mislead  
13 the judge, judicial officer, or jury by an artifice of false statement of fact or law; (C) Shall not  
14 intentionally misquote to a tribunal the language of a book, statute, or decision ...” Cal. Rules of  
15 Professional Conduct, Rule 5–200.

16 These basic requirements of candor and honesty leave no room for playing games with the  
17 facts. They do not permit a lawyer to mention a technically true fact and then blow it out of all  
18 proportion to mislead the Court.

19 The Court has broad discretion under 28 U.S.C. § 1927, Federal Rule of Civil Procedure  
20 11, and its own inherent powers to impose sanctions for conduct inconsistent with the professional  
21 standards and expectations required of all attorneys and their clients. *Moser v. Bret Harte Union*  
22 *High School*, 366 F.Supp.2d 944, 949-52 (E.D. Cal 2005). Sanctions for the tactics discussed here  
23 would be soundly within the Court’s discretion. *See Bell v. California*, No. C 01-0870 SBA, 2003  
24 WL 23784808, at \*13 (N.D. Cal. Aug. 26, 2003) (finding bad faith where counsel was not  
25 “forthright” and “took pains to ensure that the statements that they made were not false, but their  
26 statements were singularly misleading.”). However, the Court will not impose monetary or other  
27 sanctions at this time. The Court saw through the misrepresentations early in the case and denied  
28 the motion to dismiss on that basis. As a result, injury to plaintiffs, and to the integrity and


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fairness of the judicial process, were largely avoided. Consequently, the Court dissolves the OSC without formal sanctions, but advises all parties and counsel that it will watch the developments in this case with a sharp eye for any other misconduct.

This does not mean that Court will simply overlook the troubling conduct here. The Court finds that the appropriate next step is to refer this matter to the District’s Standing Committee on Professional Conduct for further consideration and recommendation. Civil Local Rule 11-6(a)(1). This Court makes the referral.

**IT IS SO ORDERED.**

Dated: August 13, 2015

  
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JAMES DONATO  
United States District Judge