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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ATHENA HOHENBERG, on behalf of herself and all others similarly situated,

Plaintiff,

v.

FERRERO USA, INC.

Defendants.

IN RE: FERRERO LITIGATION

Case No. 3:11-CV-205

CLASS ACTION

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE JUDGMENT UNDER RULE 60(B), AND FOR AN INDICATIVE RULING; OR, IN THE ALTERNATIVE, FOR LEAVE TO INTERVENE FOR THE PURPOSES OF FILING THIS MOTION**

Judge: The Hon. Marilyn Huff
Hearing: December 3, 2012
Time: 10:30 AM
Location: Courtroom 13

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## INTRODUCTION

Objectors Courtney Drey and Andrea Pridham, ("Objectors"), move to modify, and/or vacate the order granting final approval of the class settlement pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. In connection with this motion, and to the extent necessary to confer standing and/or jurisdiction, Objectors move additionally, and in the alternative, to intervene under Fed. R. Civ. P. 24 and/or for an indicative ruling in accordance with the provisions of Fed. R. Civ. P. 62.1.

## ARGUMENT

Rule 60(b) of the Federal Rules of Civil Procedure provides, as follows:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Vacatur is appropriate under all six reasons permitted under Fed. R. Civ. P. 60. As the court in *Crawford v. Honig*, 1992 U.S. Dist. LEXIS 13677 (N.D. Cal. August 31, 1992), explained:

> The lack of adequate representation in the [class action proceedings] renders the judgment entered at that time void. "It is well settled that a judgment is void 'if the court that considered it lacked jurisdiction of the subject matter, ***or if the parties or if [the court] acted in a manner inconsistent with due process of law***.'" *Watts v. Pickney*, 752 F.2d 406, 409 (9th Cir. 1985), quoting Vol. 11, Wright & Miller, Federal Practice and Procedure at 198

*Id.* at *22-23 (emphasis in original).

The *Crawford* court specifically applied Rule 60(b)(4) of the Federal Rules of Civil Procedure to invalidate a class-action judgment on the grounds of inadequate representation, holding: "In light of the inadequate representation of the interests of the *Crawford* subclass at the 1986 hearing, this court considers is necessary and appropriate to vacate the modification as a void judgment entered in violation of due process." *Id.* at *25.

Rule 60(b) also justifies *vacatur* on the ground of newly-discovered evidence Fed. R. Civ. Pro. 60(b)(2), misconduct by class counsel, *id.* at 60(b)(3), applying the judgment prospectively is no longer equitable, *id.* at 60(b)(4), and for other reasons that justify relief. Fed. R. Civ. Pro. 60(b)(6).

**1. Newly-discovered evidence seriously calls into question the adequacy of the Weston firm to represent the class.**

In doing research on an unrelated case, counsel for Objectors came across evidence that seriously calls into question the adequacy of the Weston firm, which has not been subjected to any evidentiary scrutiny or adversarial process. These include serious allegations about illegal kick-backs and fee splits, significant concerns about litigation conduct and professionalism, articulated concerns about the ability of the firm to hold funds in trust, and a litigation history with co-class counsel that amplifies the concerns raised by Objectors in their original objection.

In their previously filed objection, Objectors noted some serious concerns with the adequacy of counsel in this case, and specifically the way the case appeared to have been "manufactured" by Weston and Marron. The below-summarized evidence should give the court pause about its prior decision to deny discovery into the

Weston firm's practices. It is newly discovered because it would not be reasonable to force an objector in a class-action to look at all the prior cases involving the attorney; this would not be a reasonable burden. This information was found as a result of counsel investigating the practices of Unilever in an unrelated case. Once discovered, the information is being timely brought before this Court. Fed. R. Civ. P. 60(b)(2). Moreover, to the extent the allegations of misconduct are proved, this would be a basis for vacating the judgment under either of Fed. R. Civ. P. 60(b)(1), (3), (5), or (6). After all, it was some of these very cases that were cited by the Weston firm in support of its motion to be appointed class counsel. Subsequent developments in these cases, and/or to the extent these cases were cited misleadingly to the court also justify Rule 60 relief.

### A. Serious allegations about illegal kickbacks and fee-splits.

Specifically, the Court in *Red v. Unilever* was advised by sworn affidavits filed by co-counsel in the case, that:

(1) Mr. Weston offered a "kickback" to at lease on individual, a Ms. June Higginbotham, in return for serving as named plaintiff in this class action

(2) Mr. Weston promised Ms. Sutton, one of his paralegals, a 'finder's fee' in exchange for 'signing up' Ms. Higginbotham as a named plaintiff; and

(3) The Weston Firm has agreed to compensate its non-lawyer employees on a percentage basis from the settlement proceeds.

(See, *Red v. Unilever PLC*, Case No. C 10-00387-JW, 2010 WL 3629689 (N.D. Cal.

2010, Order dated September 14, 2010, p. 2)(attached as Exhibit A).[1] These are very serious, and indeed criminal violations. One of the former principals of the firm for which Attorney Weston used to work was disbarred and went to jail for precisely this conduct. *See*, *U.S. v. Lerach*, CR 07-964 (C.D. Cal. 2007)(criminal matter involving kickbacks to class representatives); Cal. Bus. & Prof. Code 6154 (prohibiting use of runners and cappers by attorneys); Rule 1-320, Cal. Rules of Prof. Conduct (sharing of fees between lawyers and non-lawyers is illegal).

### B. Significant concerns about prior class-action representations and litigation conduct and competence.

Moreover, Judge Marilyn Hall Patel recently had this to say regarding the performance of the Weston law firm with respect to their class-action representation:

> The Beck& Lee firm and the Weston firm claim to have seventeen pending federal actions, fourteen of which are pending in California. A review of these actions demonstrates that the vast majority of them settled prior to much litigation. Class certification was also denied in numerous actions. Some actions were dismissed after hearing on motion to dismiss. Thus, it appears that the firms do not have significant experience actually obtaining class certification, or with litigation subsequent to class certification.

*Levitt v. Yelp!*, Case No. 1-01321/10-2351 MHP (N.D. Cal. 2010)(Dkt. No., 96, Order dated August 24, 2010, p. 2, attached as Exhibit B). She refused to appoint them lead counsel: pointing to the venomous dispute that arose between the Weston Firm and Beck and Lee , and concluding they would not adequately represent the interests of other class plaintiffs in the case. *Id.*, p. 2.

[1] Ultimately, the court concluded that because the allegations related to a different case – it did not destroy adequacy for the purposes of proceeding with the settlement. But of course there was adequate co-counsel in the form of Beck and Lee and Reese Richman.

The Court also noted the litigation tactics used by Weston and Fitzgerald, and had this to say:

> It is early in this litigation and a good time to point out the responsibilities that all counsel have in this or any other litigation. The American College of Trial Lawyers has adopted Codes of Conduct for pretrial and trial. In the preamble to each they advise that a trial lawyer owes opposing counsel and the court "duties of courtesy, candor, and cooperation" at all stages of the proceedings. American College of Trial Lawyers, *Codes of Trial and Pretrial Conduct*, approved Oct. 2002, at 1. What have been refered to as 'rambo' or 'guerilla warfare' techniques should not be confused with zealous advocacy.

*Id.* at 3-4.

The Court directed counsel to the obligations of members of the California state bar, directed them to Bar website, and ordered them to file civility and professionalism pledges. *Id.*

In commenting on this, Judge Thomas J. Whelan, of this District, noted:

> Weston also has a similar situation pending before Chief Judge A. Howard Matz in the Central District of California. (See Doc. No. 20 at Ex. C, *Henderson v. Gruma Corp*p., No. CV 10-4173 AHM (C.D. Cal. 2010). And in yet another relevant example, on August 24, 2012, District Judge Marilyn Hall Patel…ordered them both to sign a pledge regarding professional civililty. (See Dec. No 20 at Ex B, Case No. C1-1321/10-2351 MHP (N.D. Cal. 2010)

*See*, Opinion of Judge Whelan, *Weston v. Reese Richman LLP; Beck and Lee, P.A* Case No. 10-CV-1694 W (CAB)(S.D. Cal. 2010, September 30, 2010)(Dkt. No. 22, attached hereto as Exhibit C) at p. 2. In this opinion the court stated as follows:

> This Court is now concerned that Weston deliberately failed to mention Judge Ware's September 14th ruling in an attempt to invoke this Court's power through deception. If true, this behavior is specifically alarming because it seems to have been aimed at improperly circumventing the rulings of other district courts.

*Id.,* at p. 3.

### C. Concerns about ability to hold funds in trust.

In the dispute that erupted before him, Judge Ware expressed serious concerns about the Weston firm's ability to hold disputed fees in trust, explaining:

> Shortly after a class settlement was reached, but before the parties could move for preliminary approval, "a dispute developed between and among the attorneys with respect to the sharing of attorneys fees. The Weston firm took the position that the Joint Prosecution Agreement was void, and filed a lawsuit in a court seeking a declaration to that effect, and demanded that Defendants deposit all settlement funds into the Weston client trust account.

Weston refused an escrow agent, and Defendants refused to settle under the circumstances demanded by Weston. This led the court to appoint a special master specifically to receive the funds, noting that the court had "serious concerns" with respect to Weston's "ability to hold the attorneys fees from the settlement in trust." *Red v. Unilever*, 10-387, Dkt. No. 103, at p.5 (attached as Exhibit A). These concerns are particularly acute in this case because of the "quick-pay" provisions of the settlement agreement. If the settlement is reversed, it appears – based on counsel's prior conduct and *modus operendi* – that they will force years of litigation regarding any effort the collect the fee.

### D. Concerns regarding litigation with co-counsel and abuse of client authority

When attorney Beck learned of the potentially unethical and illegal conduct of the Weston firm, she was retaliated against. The firm sent form letters purporting to fire the Beck firm from all the cases, and initiated litigation in this district seeking to void all the agreements on the ground the client (and class representatives) never agreed to a fee split with those firms. In other words, the Weston firm retained Beck and Reese Richman firms to work on cases, those firms

carried the laboring oar and did most of the work on the cases, and then when the cases were settled – Weston fired them and sought to keep all the fees for itself based on ethical non-disclosures to the client. Based on this conduct it is reasonable to infer something similar occurred in this case. As objectors noted in their original objection the class representative admitted that she did not know the Weston firm, never met or spoke to Weston or Fitzgerald, and did not hire them. (Drey and Pridham Objection at 8-9 of 15). Now we've learned that the Weston firm plays fast-and-loose with client representations, and disclosures. This justifies re-examination of the adequacy determination.

**2. The attorneys' fees must be held in trust, pending appeal**

Given at least one district court's concerns regarding the Weston firm's ability to hold fees in trust, and given the firms' propensity for litigation over fees – the promise to "repay" pursuant to the quick pay is of significant concern. Rule 1.15 of the Model Rules of Professional Conduct and Rules 3-700 and 4-100 of the Rules of Professional Conduct of the State Bar of California impose obligations on attorneys when a fee is disputed: specifically, to maintain those fees in trust until the fee dispute is resolved. Objectors request counsel file proof that the fees are being kept in trust pending the appeal, or that the judgment be modified, the quick-pay provisions stricken, and the funds be ordered held by the Clerk of the Court, or a special master, as in *Red v. Unilever* (attached as Exhibit A).

**3. Objectors have standing to pursue a Rule 60 motion; alternatively, they should be granted leave to intervene under Fed. R. Civ. P. 24.**

In *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994), the

Ninth Circuit held:

> A nonparty may seek relief from a judgment procured by fraud if the nonparty's interests are directly affected. See Kem Manufacturing Corp. v. Wilder, 817 F.2d 1517, 1521 (11th Cir. 1987); see also Southerland v. Irons, 628 F.2d 978, 980 (6th Cir. 1980). Moreover, a court has "inherent power . . . to investigate whether a judgment was obtained by fraud," and may bring before it "all those who may be affected . . . ." See *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580, 90 L. Ed. 1447, 66 S. Ct. 1176 (1946).
>
> Further, Rule 60(b) or an independent action allows relief from judgment to be given to "a party or his legal representative." This allows one who is in privity with a party to move for relief. 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2865, at 225-26 & n.58 (1973).

*Cf. EEOC v. Pan American World Airways, Inc.,* 897 F.2d 1499, 1504 (9th Cir. 1990)) (non-party permitted direct appeal where equities favor hearing the appeal, where non-party participated in the settlement agreement, and non-party had a stake in its proceeds discernible from the record); *see also*, *Lawrence v. Wink (in Re Lawrence*), 293 F.3d 615, 627 (2d Cir. N.Y. 2002)(several circuit courts have permitted a non-party to bring a Rule 60(b) motion or a direct appeal when its interests are strongly affected); *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044, 1052 (2d Cir. 1982) (non-party plaintiffs had standing to invoke Rule 60(b)(6) to amend a federal judgment, where they were "sufficiently connected and identified with the . . . suit"); *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992); *Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980)(Rule 60(b) claim of fraud on the court may be raised by a non-party).

Alternatively, if the court deems that objectors become parties as a condition of seeking Rule 60 relief, then they seek leave to intervene. Rule 24 of the Federal Rules of Civil Procedure governs interventions and allows for both mandatory and

permissive intervention. Rule 24(a)(2) mandates a court grant a timely motion to intervene when:

> The applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicants ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The four requirements are: (1) the motion is timely, (2) the applicant has a significantly protectable interest, (3) the applicant is situated such that disposition of the action may impair or impede the party's ability to protect that interest, and (4) the applicant's interest is not adequately represented by existing parties. *Perry v. Proposition 8 Proponents,* 587 F.3d 947, 950 (9th Cir. 2009). Class members have the right to intervene. *See, e.g., Stone v. First Union Corp.*, 371 F.3d 1305 (11th Cir. 2004). And Rule 24 should be liberally construed in favor of intervention. *City of Emeryville v. Robinson*, 612 F.3d 1251, 1258 (9th Cir. 2010).

The motion to intervene is timely. It was filed within 1 week of discovering the above facts and evidence. Objectors have an interest in the subject matter, both with respect to the appeal, the amount of attorneys' fees paid, and the obligations (and conflicts) created by class counsel's new role as *de facto* advertising consultants to Defendant. "A party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *Lockyer v. U.S.*, 450 F.3d 436, 441 (9th Cir. 2006). Objectors interests are impaired if the Weston firm and Marron continue as class counsel – they are imposing needless obstacles (such as the motion for a bond) in the way of objectors, who are seeking to maximize recovery to the class. They are in an adverse position to the class; it is in

the class' interests, and thus objectors' interests, to prosecute the appeal. The existing parties are not adequately protecting that interest and class counsel is actively obstructing it. As noted in objectors' original objection, a class representative must be adequate at all stages of the representation (including on appeal). Moreover, the Defendant did not contest adequacy at either the interim class counsel stage, or at the contested class certification stage. Thus, objectors interests are not being protected and objectors have met their minimal burden in this regard. *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1498 (9th Cir. 1995)("the burden in showing inadequate representation is minimal").

Alternatively, Objectors seek leave to intervene permissively under Rule 24(b). Permissive intervention is discretionary, and can be granted any time the applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). Discretion should be exercised in favor of intervention because objectors have claims or defenses shared with the main action. First, they have a claim for disgorgement of excessive attorneys fees, which are disputed – they share this with all the other unnamed class members. Second, objectors have a claim for legal malpractice. New case law out of the Second Circuit *Wyly v. Weiss*, 2012 U.S. App. LEXIS 21032 (October 10, 2012) suggests that this Court's order approving the fee as "reasonable" may bar a subsequent legal malpractice claim against the firms under the "relitigation" exception of the Anti-Injunction act. If the Ninth Circuit were to agree with this novel position, objectors will be impaired in their ability to seek relief against Class Counsel for their

breaches of fiduciary duty and professional negligence. It would be unfair, inequitable and unjust to deny a claim to objectors based on an action they could not participate in meaningfully due to a lack of party status and/or discovery. This independently justifies intervention.

**4. Objectors seek an "indicative ruling" under Rule 62.1**

The United States Supreme Court and Ninth Circuit have repeatedly and held that the filing of a notice of appeal divests the district court of jurisdiction to alter, amend, or modify the order or judgment on appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam)("The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal"). *See also*, *City of L.A. v. Santa Monica BayKeeper*, 254 F.3d 882 (9th Cir. Cal. 2001)("as a general rule, 'the filing of a notice of appeal … divests the district court of control over those aspects of the case involved in the appeal'"); *Natural Res. Def. Council v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. Cal. 2001)(once a notice of appeal is filed, the district court is divested of jurisdiction over the matters being appealed); *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 772 (9th Cir.), cert. denied, 479 U.S. 987 (1986); *Cel-a-Pak v. California Agr. Labor Relations Bd.*, 680 F.2d 664, 667 (9th Cir.), cert. denied, 459 U.S. 1071 (1982)("Once a notice of appeal is filed jurisdiction is vested in the Court of Appeals, and the trial court thereafter has no power to modify its judgment in the case or proceed further except by leave of the Court of Appeals"); *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982); *Visioneering Constr.*

*& Dev. Co. v. United States Fidelity & Guar.*, 661 F.2d 119, 124 n. 6 (9th Cir. 1981) ("Once a notice of appeal is filed jurisdiction is vested in the Court of Appeals, and the trial court thereafter has no power to modify its judgment in the case or proceed further except by leave of the Court of Appeals."). The purpose of the rule is to promote judicial economy and avoid the confusion that would ensue from having the same issues before two courts simultaneously. *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir. 1983); 20 James Wm. Moore, Moore's Federal Practice, § 303.32[1] (3d ed. 2000).

The Federal Rules of Civil Procedure, however, recognize that in some circumstances it can be helpful to the parties and to the court of appeals to know what the District Court might do if given the chance to consider some aspect of the appealed case. Federal Rule of Civil Procedure 62.1 allows such indicative rulings when authorized by the court of appeals. Fed. R. App. P. 12.1. *Defenders of Wildlife v. Salazar*, 776 F. Supp. 2d 1178, 1182 (D. Mont. 2011). As the Court explained in *Salazar*,

> The procedure that must be followed under Rule 62.1 first involves asking the District Court to indicate what it would do with the question, or at least consider whether there is a serious issue raised. The indicative ruling procedure has at least four steps. First, the appealing parties must be motivated by some concern or issue and specifically ask for an indicative ruling. Second, the District Court is then obliged to indicate its view of the request. If the request is denied, that ends the inquiry. If the District Court is inclined to grant the request for an indicative ruling, the third step is to tell the parties and the Circuit Court of its intent. Finally, it is up to the Circuit Court to decide whether it will send the case back to the District Court and empower the lower court to rule. This case is now at step two.

Pursuant to these procedures – and to the extent necessary for a Rule 60(b) motion – objectors seek an indicative ruling on the issues raised by this motion.

## RELIEF REQUESTED

WHEREFORE, objectors request that this court grant the following relief:

A. That to the extent it is jurisdictionally required, this court make an indicative finding, under Rule 62.1, that it would be inclined to grant the Rule 60 relief, or that a "serious issue" is raised;

B. That the court allow 60 days for discovery on the issues raised by the Rule 60 motion;

C. That the court grant the requested relief, and vacate the order finally approving the settlement pursuant to Rule 60(b) on the grounds is it void for lack of adequacy and lack of due process; alternatively, that the judgment is vacated on other grounds stated in Rule 60;

D. That the court determine the named class representatives and their counsel are not adequate to continue to represent the settlement class in this case;

E. That, to the extent the court deems necessary to confer standing, that objectors are granted leave to intervene pursuant to Rule 24 to pursue any of the relief stated in A through D, above; and

F. Any other relief the court deems just or appropriate pursuant to its inherent powers.

A proposed form of order is attached.

Dated: November 5, 2012

By: /s/ *Grenville Pridham*
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**EXHIBITS ATTACHED**

Exhibit A: Order in *Red v. Unilever*, dated September 14, 2010, Docket Entry 103, Case No. 10-387 (N.D. Cal. JW)

Exhibit B: Order in *Levitt v. Yelp,! Inc*., dated August 24, 2010 Docket Entry 96, Case No. 10-2351 (N.D. Cal. MHP)

Exhibit C: Order in *Weston Firm PC v. Reese Richman LLP; Beck & Lee, P.A*., dated September 30, 2010 (S.D. Cal. CAB)