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10 **UNITED STATES DISTRICT COURT**
 11 **SOUTHERN DISTRICT OF CALIFORNIA**

13
 14 **IN RE FERRERO LITIGATION**

Case No. 3:11-cv-00205 H KSC
 Pleading Type: Class Action

OPPOSITION TO NON-PARTY OBJECTORS' MOTION TO VACATE JUDGMENT UNDER RULE 60(B) AND FOR AND INDICATIVE RULING; OR IN THE ALTERNATIVE, FOR LEAVE TO INTERVENE FOR THE PURPOSES OF FILING THIS MOTION (DKT. NO. 145)

Judge: The Honorable Marilyn L. Huff
 Date: December 3, 2012
 Time: 10:30 a.m.
 Location: Courtroom 13

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1 **INTRODUCTION**

2 The Court should deny the Motion of Objector-Appellants Courtney Drey and Andrea Pridham
3 (Dkt. No. 145) to vacate or modify its July 9, 2012 Final Judgment and Order Approving Settlement
4 (Dkt. No. 127). When they took their appeal, Objectors “divest[ed] the [Court] of jurisdiction to alter,
5 amend, or modify” the Judgment. (Mot. at 11 (citing *Griggs v. Provident Consumer Discount Co.*, 459
6 U.S. 56, 58 (1982)).) The Court might nevertheless entertain Objectors’ Motion pursuant to Fed. R.
7 Civ. P. 62.1—if it is properly brought. But the Motion is improper.

8 In violation of the Local Rules, the non-party Objectors did not seek leave to file the Motion.
9 *See infra* Point I.A.1. And though stated as a vacatur motion, Objectors rehash arguments the Court
10 rejected when it overruled their objection, and lodge a new objection. Thus, the motion is actually a
11 deficient and untimely Application for Reconsideration, and an out-of-time objection that has been
12 waived. *See infra* Point I.A.2. But even if the Motion’s filing had been proper, it is untimely under the
13 substantive law governing Rule 60(b) motions. *See infra* Point I.B.

14 Had Objectors properly filed a timely Rule 60(b) Motion, it would still lack merit, since they
15 fail to demonstrate that any of the reasons justifying vacatur are present. Most importantly, there is no
16 merit to the discredited accusations that Objectors cite—made in 2010 by discharged co-counsel—for
17 their contention that the Weston Firm is, or ever was, inadequate counsel. To the contrary, several
18 courts have carefully reviewed and rejected those accusations, and the firm has been repeatedly
19 appointed class counsel in the ensuing years. *See infra* Point I.C.

20 Objectors separately ask that the Court direct Class Counsel to “file proof” that the attorneys’
21 fees the Court awarded are being held in trust. (Mot. at 7.) But Objectors have provided no authority
22 that this is required just because they appealed the Judgment. *See infra* Point II.A. Nor do Objectors
23 have a factual basis or standing for their request. *See infra* Point II.B.

24 Alternatively, Objectors ask that the Court “modi[y]” the Judgment by striking one of the
25 Settlement Agreement’s provisions and requiring that the fees awarded be “held by the Clerk of the
26 Court, or a special master” (Mot. at 7.) This request is untimely under Rule 59(e) and anyway, the
27 Court lacks the authority to grant that relief. *See infra* Point II.C.

28 Accordingly, the Court should deny Objectors’ Motion. *See* Fed. R. Civ. P. 62.1(a)(2).

1 **ARGUMENT**

2 As Objectors concede (Mot. at 11-12), “[o]nce an appeal from a judgment is filed, the district
3 court is ousted of jurisdiction to take certain actions.” *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119,
4 1123 (N.D. Cal. 2011) (citing *Davis v. Yageo Corp.*, 481 F. 3d 661, 685 (9th Cir. 2007)); *see also Perea*
5 *v. Loera*, 2012 U.S. Dist. LEXIS 144068, at *3 (S.D. Cal. Oct. 4, 2012) (“The general rule is that a
6 timely notice of appeal will divest a district court of jurisdiction over the action, including divesting a
7 district court of the power to grant a Rule 60(b) motion” (quoting 12 James Wm. Moore et al.,
8 Moore’s Fed. Practice § 60.67[1], at 60-229 (3d ed. 2012) (footnote and citation omitted))). Objectors
9 filed their notice of appeal on August 7, 2012. (*See* Dkt. No. 130.) Notwithstanding:

10 Fed. R. Civ. P. 62.1(a) provides that “[i]f a timely motion is made for relief that the court
11 lacks authority to grant because an appeal has been docketed and is pending, the [district]
12 court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it
13 would grant the motion if the court of appeals remands for that purpose or that the motion
14 raises a substantial issue.” Therefore, notwithstanding the pending appeal of the
Judgment, the Court has jurisdiction to hear this [Rule 60(b)] Motion and, in doing so, to
take one of the actions specified by Rule 62.1.

15 *Perry*, 790 F. Supp. at 1123.

16 **I. THE COURT SHOULD DENY OBJECTORS’ VACATUR MOTION**

17 **A. The Motion is Improper**

18 ***I. Non-Party Objectors Improperly Filed the Motion Without the Court’s Leave***
19 ***(S.D. Cal. Civ. L.R. 5.1(h))***

20 In class actions, absent intervention, “[o]bjectors are not parties to the underlying action,”
21 *Brown v. Bush*, 194 Fed. Appx. 879, 883 (11th Cir. 2006) (per curiam). Because Objectors are not
22 parties, they cannot file a Motion without first obtaining leave from the Court. S.D. Cal. Civ. L.R.
23 5.1(h) (“Except as provided in the federal rules, or by leave of court, ***no document will be filed in any***
24 ***case by any person not a party thereto.***” (emphasis added)). *C.f. Wende v. Countrywide Home Loans,*
25 *Inc.*, 2011 U.S. Dist. LEXIS 28724, at *1 n.1 (S.D. Cal. Mar. 21, 2011) (movant was “not a named
26 party and therefore cannot file documents in this case” (citing S.D. Cal. Civ. L.R. 5.1(h))); *Soto v. FCM*
27 *Corp.*, 2011 U.S. Dist. LEXIS 3436, at *1-2 n.1 (S.D. Cal. Jan. 13, 2011) (same); *Oliver v. U.S. Bank,*
28 *N.A.*, 2012 U.S. Dist. LEXIS 87126, at *2 (N.D. Cal. June 22, 2012) (“[A]s a non-party, [movant] does

1 not have standing to bring this motion.”); *Dail v. City of Goldsboro*, 2011 U.S. Dist. LEXIS 61731, at
2 *3 (E.D.N.C. June 9, 2011) (“As a mere non-party, [movant] has no standing to file pleadings or
3 motions in this lawsuit.” (citing Fed. R. Civ. P. 12(f))); *Pitre v. Blanchard*, 1996 U.S. Dist. LEXIS
4 4368, at *4 n.4 (E.D. La. Mar. 27, 1996) (non-party did not have standing to file a motion). Objectors
5 could have sought leave to make their Motion prior to filing it, but chose not to.

6 **2. Objectors’ Motion is a Deficient and Untimely Application for Reconsideration**
7 **(S.D. Cal. Civ. L.R. 7.1(i)) and Asserts a New and Waived Objection**

8 Objectors’ original June 8 objection included a lengthy section questioning Class Counsel’s
9 adequacy. Guised as a motion to vacate or modify the Judgment, Objectors’ new filing is an admitted
10 rehash. (*See* Mot. at 2 (“In their previously filed objection, Objectors noted some serious concerns with
11 the adequacy of counsel, and specifically the way the case appeared to have been ‘manufactured’ by
12 Weston and Marron.”), 7 (“As objectors noted in their original objection[,] the class representative
13 admitted that she did not know the Weston firm [sic], never met or spoke to Weston or Fitzgerald, and
14 did not hire them.” (citing Dkt. No. 123 at 8-9)); 10 (“As noted in objectors’ original objection, . . . the
15 Defendant did not contest adequacy at either the interim class counsel stage, or at the contested class
16 certification stage.”).)

17 Brought four months after the Court entered Judgment, and three months after they appealed it,
18 Objectors’ instant Motion thus not only violates the objection process in the Court’s Preliminary
19 Approval Order,¹ but also constitutes a deficient and untimely motion for reconsideration. S.D. Cal.
20 Civ. L.R. 7.1(i); *c.f. Perea*, 2012 U.S. Dist. LEXIS 144068, at *4-5 (denying motion for reconsideration
21 for failure to comply with L.R. 7.1(i)(1)); *Martin v. Nicholson*, 151 Fed. Appx. 928 (Fed. Cir. 2005)
22 (treating “motion for relief from judgment or order” as “an out of time motion for reconsideration”).

23 Objectors do not just re-assert objections the Court overruled, but also bring a new objection, to
24 the Settlement Agreement’s “quick pay” provision. (*See* Mot. at 7.) This objection is untimely and thus
25 improper. (*See* Dkt. No. 108 at 6 ¶ 7(a).) It is also meritless. *See infra* Point II.

26 ¹ The Court’s January 23, 2012 Order Granting Preliminary Approval provided that “[a]ny objection
27 must be . . . delivered to Class Counsel and Defense Counsel . . . no later than **30 days** before the
28 Fairness Hearing,” which took place on July 9, 2012. (*See* Dkt. No. 108 at 6 ¶ 7(a).) Objectors’ Motion
is nearly five months late.

1 In an analogous situation, this District’s Honorable John A. Houston recently stuck three
2 objectors’ purported “response” to a stipulation that the parties had filed after the fairness hearing,
3 which slightly modified the settlement agreement. Like here, the objectors’ filing rehashed arguments
4 they had already presented and raised new ones. (*See* Fitzgerald Decl. Exs. 1-2 (Oct. 16, 2012 Order in
5 *Gallucci et al. v. Boiron, Inc. et al.*, No. 3:11-cv-2039-JAH (S.D. Cal.), and Motion on which it was
6 based.)

7 **B. The Motion is Untimely**

8 Even if Objectors’ Motion were properly filed, it is untimely. “The timeliness of a motion to
9 vacate a judgment is governed by Fed. R. Civ. P. 60(b), which permits a court to entertain a motion to
10 relieve a party from a final judgment if the motion is made ‘at the earliest possible time after the facts
11 are discovered.’” *Perry*, 790 F. Supp. 2d at 1123 (citing *First Interstate Bank of Az., N.A. v. Murphy*,
12 *Weir & Butler*, 210 F.3d 983, 988 n.8 (9th Cir. 2000)).

13 “What constitutes a reasonable time” under Rule 60(b) “depends on the facts of each case.” *In re*
14 *Pac. Far East Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989) (quotation marks and citation omitted).
15 Relevant to the determination of timeliness are “the interest in finality, the reason for delay, the
16 practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties.”
17 *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981) (per curiam).

18 Objectors assert that they only recently discovered the “facts” on which their vacatur motion is
19 premised, while their counsel was “doing research on an unrelated case . . .” (Mot. at 2.) The items
20 Objectors cite, however, are not facts, but publicly-filed court decisions from 2010. (*See* Mot. at 3-6 &
21 Exs. A-C.) Even if such publicly-available court decisions could otherwise support the timeliness of a
22 Rule 60(b) motion, Objectors’ contention that they only recently discovered them is belied by their
23 admission that “these very cases . . . were cited by the Weston firm [sic] in support of its motion to be
24 appointed class counsel.” (Mot. at 3.)² That motion was, of course, available for Objectors’ review. And

25 _____
26 ² Objectors also suggest that their Motion should “give the court pause about its prior decision to deny
27 discovery into the Weston firm’s practices.” (Mot. at 2-3.) Objectors never made such a request, but if
28 they had, it too would contradict their assertion that their counsel could not reasonably have discovered
these publicly-available 2010 court decisions earlier than four months after the court entered Judgment
by showing their heightened suspicion of Class Counsel’s supposed “practices” affecting adequacy.

1 they did review it—their objection quoted the motion. (Dkt. No. 123 at 10:14-23.) On the other hand,
2 Objectors provide no authority for their conclusory assertion that “it would not be reasonable” for
3 absent class members who object to the adequacy of class counsel “to look at all the prior cases
4 involving the attorney[.]” (Mot. at 3.)

5 C. The Motion is Meritless

6 1. Legal Standard

7 The Federal Rules allow district courts to relieve a party³ from a judgment for any enumerated
8 reason that justifies relief. Fed. R. Civ. P. 60(b). The Rule “provides for extraordinary relief and may be
9 invoked only upon a showing of exceptional circumstances.” *Dish Network, L.L.C. v. Sonicview USA,*
10 *Inc.*, 2012 U.S. Dist. LEXIS 146838, at *4 (S.D. Cal. Oct. 11, 2012) (citing *Engleson v. Burlington N.*
11 *R. Co.*, 972 F.2d 1038, 1044 (9th Cir. 1994)); *see also United States ex rel. Technica, LLC v. Carolina*
12 *Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 51766, at *30-31 (S.D. Cal. Apr. 12, 2012) (Huff, J.) (Rule 60(b)
13 “is an extraordinary remedy and is only granted in exceptional circumstances.”). The Ninth Circuit has
14 “cautioned against the use of provisions of Rule 60(b) to circumvent the strong public interest in [the]
15 timeliness and finality’ of judgments.” *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009)
16 (quoting *Flores v. Arizona*, 516 F.3d 1140, 1163 (9th Cir. 2008)).

17 Whether to grant or deny a Rule 60(b) motion is within the sound discretion of the district court.
18 *Southern Ins. Co. v. Wastequip Mfg. Co., LLC*, 2012 U.S. Dist. LEXIS 97663, at *4 (S.D. Cal. July 13,
19 2012) (“*Wastequip*”) (Huff, J.) (citing *Navajo Nation v. Norris*, 331 F.3d 1041, 1046 (9th Cir. 2003)
20 (citing *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000)); *see also United*
21 *States ex rel. Technica LLC v. Carolina Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 67219, at *6 (S.D. Cal.
22 May 14, 2012) (“*Technica II*”) (Huff, J.) (“Relief under Rule 60(b) is not a matter of right. Rather, it
23 rests in the trial court’s sound discretion.” (citing *Carter v. Untied States*, 973 F.2d 1479, 1489 (9th Cir.

24 _____
25 ³ Objectors assert that they have standing to bring the motion despite that Rule 60(b) provides that “the
26 court may relieve *a party* or its legal representative from a final judgment, order, or proceeding” for one
27 of the enumerated reasons, Fed. R. Civ. P. 60(b) (emphasis added), and that absent intervention, class
28 action objectors are not parties, *see Brown*, 194 Fed. Appx. at 883. (*See Mot.* at 7-10.) Plaintiffs decline
to address this argument and Objectors’ alternative assertion that they have a right or should be
permitted to intervene under Rule 24, because their motion lacks merit and should be denied even if,
arguendo, they have standing and/or are granted leave to intervene.

1 1992); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992))).

2 **2. Relevant Facts**

3 a. Procedural History

4 After Class Counsel obtained certification (Dkt. No. 95), and following months of negotiations,
5 including two sessions before the Honorable Cathy Ann Bencivengo, and one session before the
6 Honorable Nicholas J. Politan (Ret.), the parties reached a class action settlement that the Court, on
7 January 23, 2012, preliminarily approved (Dkt. No. 108).

8 On June 8, 2012, through their professional-objector counsel, Drey and Pridham filed an
9 objection (Dkt. No. 123), which, because it was unsigned, did not comply with the Court’s Preliminary
10 Approval Order. (*See* Dkt. No. 125 at 4-6.) Excusing this defect, the Court nevertheless entertained the
11 objection, which included a five-page section challenging Class Counsel’s adequacy. (Dkt. No. 123 at
12 7-11.) This included the assertions that “Defendants [sic] did not raise the issue of adequacy when Class
13 Counsel made their motion for appointment” and that “Defendant’s objection to class certification did
14 not address the adequacy” requirement. (*Id.* at 7.) Objectors also argued that Class Counsel had
15 “manufactured” the litigation and that the Weston Firm had supposedly represented Ms. Rude-Barbato
16 without her knowledge. (*Id.* at 7-10.)

17 Plaintiffs and Class Counsel responded by pointing out the Court’s consideration of detailed
18 declarations supporting Class Counsel’s adequacy, noting that “Drey and Pridham’s contention that
19 Ferrero ‘did not address the adequacy’ [requirement] . . . demonstrat[es] only that Ferrero had no
20 grounds to do so,” and addressing Objectors’ suggestion that there was some sort of impropriety in the
21 filing of Plaintiffs’ complaints or the Weston Firm’s representation of Ms. Rude-Barbato. (*See* Dkt. No.
22 125 at 8-11.)

23 By the time of the Fairness Hearing, during which time Objectors’ counsel presented oral
24 argument, the Court had favorably determined Class Counsels’ adequacy *twice*. (*See* Dkt. Nos. 11 at 4,
25 95 at 7.) The Court thus overruled these objections. (Dkt. No. 127 at 6-7 ¶ 13.)

26 On August 7, 2012, Objectors appealed “all prior interlocutory orders entered in the case and
27 related to preliminary or final approval of the class action settlement, orders approving attorneys’ fees
28 to class counsel, and the protective order entered” as well as “all interlocutory opinions and orders,

1 which merge into the final approval and judgment.” (Dkt. No. 130 at 1.)

2 On October 10, 2012, Plaintiffs filed a Motion for Appeal Bond (Dkt. No. 140), and on October
3 29, Objectors filed their opposition (Dkt. No. 142). On November 9, the Court denied the bond motion
4 on the grounds that “Plaintiffs have provided insufficient evidence that there is a risk of nonpayment by
5 Objectors should Plaintiffs be awarded costs on appeal.” (Dkt. No. 150 at 1.)

6 Before the Court issued its decision, however, and one week after they filed their Opposition,
7 Objectors filed the instant “Motion to Vacate Judgment Under Rule 60(b), and for an Indicative Ruling;
8 or, in the Alternative, for Leave to Intervene for the Purposes of Filing this Motion.” (Dkt. No. 145.)
9 They did not seek leave to file the Motion, as they were required. S.D. Cal. Civ. L.R. 5.1(h).

10 b. Objectors’ “Newly Discovered Evidence”

11 (i.) *Elizabeth Beck’s “Baseless” Accusations of Misconduct*

12 More than two years ago, a dispute arose between the Weston Firm and Beck & Lee, a two-
13 attorney Miami law firm the Weston Firm hired as co-counsel for several cases in March 2010. Only
14 five months later, in August 2010, Beck & Lee was discharged by Mr. Weston’s clients, at his advice,
15 for a variety of reasons. Following her termination, attorney Elizabeth Beck entered a declaration in *Red*
16 *v. Unilever United States, Inc.*, No. 10-cv-00387 (N.D. Cal.) (“*Unilever*”) making ridiculous
17 accusations of “kickbacks,” using “runners and cappers,” and improper fee splits with staff.⁴

18 Beck’s accusations have continually been discredited. For example, in a decision granting a
19 Weston Firm client’s request to strike the Becks’ filings from the docket because they were made
20 without client authorization in violation of C.D. Cal. Civ. L.R. 11-1, *Yumul v. Smart Balance*, 2010 U.S.
21 Dist. LEXIS 116960, at *8-21 (C.D. Cal. Oct. 25, 2011), the Honorable Margaret M. Morrow also
22 denied Beck & Lee’s motion to disqualify the Weston Firm, noting that such motions “are frequently
23 pursued for tactical reasons,” *id.* at *11, and that “Beck & Lee’s allegations do not specifically concern

24 _____
25 ⁴ Objectors ask the Court to make negative inferences against the Weston Firm because of Mr.
26 Weston’s previous employment with the firm now known as Robbins Geller Rudman & Dowd LLP,
27 whose predecessor was co-founded by disbarred attorney William S. Lerach. (*See Mot.* at 4.) If
28 accepted, such “guilt by prior association” would tar the reputations of the more than 140 current, and
hundreds more former attorneys at Robbins Geller and its predecessor firms, including even the
honorable judges J. Lawrence Irving, Jan M. Adler, and William S. Dato, who all worked at Robbins
Geller’s predecessor firms much longer than Mr. Weston.

1 this case and no evidence has been adduced supporting them and . . . there is at least a possibility that
2 Beck & Lee made the allegations to gain a tactical advantage in its dispute with Weston” *Id.* at
3 *13. Notwithstanding, Judge Morrow noted that “[i]n determining whether to certify a class in this case,
4 . . . unethical conduct by plaintiff’s counsel would be a relevant consideration.” *Id.* at *18. She therefore
5 directed that “if defendant believes that the ethics of class counsel is an appropriate issue to raise in
6 opposition to a motion for class certification, it will bring the matter to the attention of the court.” *Id.* at
7 *20-21 n.9.

8 Following Judge Morrow’s decision, the defendant carefully inquired into the Becks’
9 accusations at two separate depositions of the lead plaintiff. It then opposed class certification on a
10 number of grounds—but not the adequacy of counsel. Judge Morrow noted this in her 41-page tentative
11 order granting the class certification:

12 In August 2010, the Weston Firm’s (“Weston”) former co-counsel, Beck & Lee, sought
13 to have Weston disqualified from representing the putative class, alleging that Weston
14 had engaged in unethical conduct, including the offering of kickbacks to named plaintiffs
15 in other class actions. The court declined to disqualify Weston at that time, because none
16 of the allegedly unethical conduct had taken place in this action, and because it concluded
17 the matter was more properly considered in the context of a motion for class certification.
18 The court granted Smart Balance’s request to modify the scheduling order to allow it to
19 explore the alleged ethical breaches, so that it could present evidence relevant to them in
20 opposition to any future class certification motion. As Smart Balance has not argued that
21 either Yumul or Weston are inadequate due to their involvement in ethical violations in
22 its opposition, the court concludes that ***Beck & Lee’s allegations do not compel a
23 finding that the adequacy requirement is not satisfied.***

24 (Fitzgerald Decl. Ex. 3 at 29-30 n.77 (emphasis added).) Accordingly, Judge Morrow tentatively
25 granted plaintiff’s motion for class certification. After the parties settled, the Court granted preliminary,
26 then final approval, affirming the adequacy of counsel each time. (*See Yumul v. Smart Balance, Inc.*,⁵
27 No. 10-cv-00927-MMM (C.D. Cal.) (“*Yumul*”), Dkt. Nos. 139 at 2 ¶ 4 (“The Weston Firm is qualified
28 to serve as Class Counsel.”), 161 at 2 ¶ 7 (“Having considered the factors set forth in Rule 23(g)(1), the
29 court finds that class counsel fairly and adequately represented the class in entering into and
30 implementing the settlement, and thus appoints class counsel as counsel to represent the settlement class

⁵ Subsequently re-styled *In re Nucoa Real Margarine Litigation*.

1 members.”.)

2 Judge Morrow was the first, but not the only district judge to reject the contention that Beck’s
3 accusations weighed against the Weston Firm’s adequacy as class counsel. Considering the same
4 information that Objectors’ Motion raises, provided by a Defendant opposing class certification, the
5 Honorable George H. Wu held:

6 [W]hile considering Plaintiffs’ previous class certification motion, the Court found that it
7 “would have an obligation to the putative class to fully investigate” allegations launched
8 by former co-counsel Beck & Lee of impropriety on the part of the Weston firm. The
9 Court has now considered the detailed description of the Beck & Lee/Weston Firm
10 dispute provided in Gregory Weston’s declaration,⁶ and *is inclined to find the
11 accusations sufficiently groundless, and would not preclude the appointment of the
12 Weston Firm as class counsel. Other courts have similarly considered such accusations
13 sufficiently baseless so as not to preclude appointing the Weston Firm as class counsel.*

11 *Red v. Kraft Foods, Inc.*, No. 10-cv-1028-GW, Dkt. 212, slip op. at 16-17 (C.D. Cal. Apr. 4, 2012)
12 (emphasis added and citations omitted).⁷ (Fitzgerald Decl. Ex. 4.)

13 Even more recently, this District’s Judge Houston, considering the same information provided
14

15 ⁶ Referring to *Red v. Kraft Foods, Inc.*, No. 10-cv-1028-GW (C.D. Cal.), Dkt. No. 158.

16 ⁷ In an analogous situation, Beck & Lee was sanctioned this summer when a court found it could not:

17 escape the conclusion that [certain false allegations contained in an amended complaint]
18 were cut out of whole cloth. And even if BCJJ did not affirmatively fabricate these
19 claims, its failure to ask [certain BCJJ representatives] about their truth before making
20 them evinces a failure to conduct reasonable inquiry into the evidentiary basis of BCJJ’s
21 factual claims.

21 *BCJJ, LLC v. Lefevre*, 2012 U.S. Dist. LEXIS 91839, at *12 (M.D. Fla. July 3, 2012). The court
22 concluded that:

23 [t]he lodging of specious claims without any reasonable evidentiary basis . . . was the
24 result of either of two things: (1) BCJJ’s . . . failure to investigate its claims before
25 making them . . . ; or (2) BCJJ’s fabrication of the factual allegations . . . as part of some
26 cavalier bid to survive [the defendant’s] next motion to dismiss. The Court is unsure of
27 which would be worse, though perhaps carelessness is better than dishonesty. Either way,
28 BCJJ’s actions are inimical to the ends of justice and anathema to those ideals that should
guide all parties when resort to the court system becomes necessary.

27 *Id.* at *13. After granting Rule 11 sanctions, the court then referred the matter to the magistrate to
28 determine “whether these costs and fees should be assessed against BCJJ and/or its attorneys, Beck &
Lee, P.A.” *Id.* at *14.

1 by a group of objectors to a class action settlement obtained by Class Counsel here, found the objectors
2 had “present[ed] no credible evidence to support a finding that Class Counsel lack the qualifications to
3 represent the Class in this action.” *Gallucci v. Boiron, Inc.*, 2012 U.S. Dist. LEXIS 157039, at *10 (S.D.
4 Cal. Oct. 31, 2012) (granting settlement final approval).⁸

5 Similarly, in June 2011, the Honorable Richard Seeborg appointed the Weston Firm interim
6 class counsel in a contested motion, despite that another firm, competing for appointment, cited the
7 same slew of language that Objectors cite from these 2010 court decisions. *Chacanaca v. Quaker Oats*
8 *Co.*, 2011 U.S. Dist. LEXIS 65023 (N.D. Cal. June 14, 2011).⁹

9 (ii.) *Judge Ware’s Order Denying Beck’s Termination in Unilever*

10 Objectors rely, in part, on a September 14, 2010 Order of the Honorable James Ware in
11 *Unilever*, which they mischaracterize. (See Mot. at 3-4, 6-7 & Ex. A.) For example, Objectors contend
12 that “the Court in *Red v. Unilever* was advised by sworn affidavits filed by co-counsel in the case that”
13 Mr. Weston supposedly engaged in misconduct. In reality, the accusations were levied in a *single*
14 *declaration* by Beck, after she was terminated. Objectors also omit that while simply noting the
15 accusations, the court also noted “the Weston Firm denies any misconduct, and alleges a pattern of
16 interference and bad faith conduct on the part of certain attorneys at Beck & Lee. The Weston Firm also
17 submitted declarations from Ms. Higginbotham and Ms. Sutton, denying the alleged misconduct.” (See
18 Mot. Ex. A. at 2.)

19 In any event, as Objectors point out, the *Unilever* court did not find the accusations to be
20 truthful, or the Weston Firm to be inadequate. (Mot. at 4 n.1.) Contrary to what the Objectors suppose,
21 this was not merely because there were other “adequate co-counsel” (*Id.*) Rather, Judge Ware
22 granted final approval to the settlement, appointed three Weston Firm clients Class Representatives, and
23 appointed the Weston Firm Class Counsel for the settlement class. (See *Unilever* Dkt. No. 163.)

24
25 ⁸ The objectors’ argument, which cited the same decisions that Objectors here cite, is available at
26 *Gallucci v. Boiron, Inc.*, No. 11-cv-2039-JAH (S.D. Cal.), Dkt. No. 96 at 21-22.

27 ⁹ The competing counsel’s argument, which cited the same decisions that Objectors here cite, is
28 available at *Chacanaca v. Quaker Oats Co.*, No. 10-cv-502-RS (N.D. Cal.) (subsequently restyled *In re*
Quaker Oats Labeling Litigation), Dkt. No. 87 at 6-7 and Exs. 1-2, 6.

1 Finally, Objectors cite the *Unilever* decision to argue there are “serious concerns about the
2 Weston firm’s [sic] ability to hold disputed fees in trust” (Mot. at 6.). But the concern Judge Ware
3 raised was unique to the procedural posture of that case (*see* Mot. Ex. A at 5) and the situation between
4 the attorneys there. *See generally Unilever* Dkt. No. 93 at 19-20 (attorneys had agreed to escrow
5 disputed funds in a Weston Firm account). *Compare Yumul*, 2010 U.S. Dist. LEXIS 116960, at *5 n.6 (

6 Judge Ware determined that “because of the unanimous interest in proceeding with the
7 settlement . . . it would be in the best interest of the class if the Court established a
8 procedure that would permit the settlement to proceed and that would defer the attorney
9 fees division to a later proceeding.” . . . The circumstances in this case dictate a different
result. Here, there is no pending settlement. Nor, indeed, has the matter progressed
beyond the initial stages of discovery.)

10 (iii.) *Judge Patel’s Interim Counsel Decision in Yelp*

11 On July 19, 2010, the Weston Firm and Beck & Lee appeared before Judge Patel for a case
12 management conference in what is now styled *Levitt v. Yelp*, No. 10-cv-1321-EMC (N.D. Cal.)
13 (“*Yelp*”). After Judge Patel ordered the case consolidated with a second, later-filed action, she ordered
14 the respective plaintiffs’ counsel to meet and confer with defendant’s counsel in the courthouse’s
15 Attorneys Lounge, to determine a schedule for filing a consolidated complaint and beginning discovery.
16 (*See* Fitzgerald Decl. Ex. 5 (*Unilever* Dkt. No. 85, Fitzgerald Decl. ¶ 8).) What ensued was described by
17 David Ongaro, plaintiff’s counsel in the later-filed action, as “a scene I have never seen in 19 years of
18 practicing law.” Defense counsel Matthew D. Brown confirmed, “I have not had a conference quite like
19 the one I experienced, in my years of practice here either.” (*See id.* (excerpts from the *Unilever*
20 Fitzgerald Declaration, including corresponding pages of the transcript of the *Yelp* July 19 hearing).)

21 While the contested interim counsel motion was pending before Judge Patel, the dispute
22 between the Weston Firm and Beck & Lee arose, along with Beck & Lee’s termination. Each firm then
23 submitted supplemental papers. As a result, Judge Patel elected to appoint Mr. Ongaro’s firm as interim
24 class counsel, “concerned that the dispute between the firms will preclude both firms from adequately
25 representing the interests of plaintiffs only represented by the other firm.” (Mot. Ex. B at 2.)
26 Nevertheless, Judge Patel stated she “may be willing to revisit the issue of lead counsel if the attorneys
27 are able to demonstrate a working relationship amongst themselves that will foster efficiency.” (*Id.* at
28 3.) Finally, after an early discovery dispute, the incident in the Attorneys Lounge, and the counsel split,

1 Judge Patel ordered that *all* attorneys in the case—not just the Weston Firm—sign a pledge to abide by
2 the California Attorney Guidelines of Civility and Professionalism. (*Id.* at 3-4.)

3 (iv.) *Judge Whelan’s Order to Show Cause*

4 As part of its dispute, the Weston Firm filed a declaratory judgment action in the Southern
5 District of California on August 12, 2010, the same day it terminated Beck & Lee on behalf of its
6 clients, seeking a declaration that its joint prosecution agreement with Beck & Lee was void. Following
7 the filing, Beck & Lee engaged in a variety of objectionable behavior, including making repeated
8 attempts to contact the Weston Firm’s clients, serving invalid and harassing subpoenas on the Weston
9 Firm’s former staff, and defaming the Weston Firm in the media. As a result, the Weston Firm sought a
10 TRO in September 2010.

11 Beck & Lee opposed the TRO, arguing that the Weston firm was improperly attempting to
12 invoke the court’s authority by deception to circumvent Judge Ware’s decision denying their
13 termination. The court denied the TRO application and, based on Beck & Lee’s memorandum, ordered
14 the Weston Firm to show cause why Rule 11 sanctions should not issue. The Weston Firm submitted its
15 response, showing that Beck & Lee had failed to include the transcript of the hearing before Judge
16 Ware, but that the firm was acting in accordance with Judge Ware’s comments during the hearing,
17 which acknowledged the Southern District litigation and deferred the issue of the enforceability of the
18 joint prosecution agreement to that court. *See Weston Firm, P.C. v. Beck & Lee, P.A.*, No. 10-cv-1694-
19 W (S.D. Cal.), Dkt. No. 25. Beck & Lee then submitted a second memorandum arguing that the Weston
20 Firm should be sanctioned. *See id.*, Dkt. No. 30. After reading the papers, however, Judge Whelan
21 concluded that “SANCTIONS ARE NOT WARRANTED for violation of Rule 11(b) at this time.”
22 (Fitzgerald Decl. Ex. 6.)

23 c. Plaintiffs’ Motion for Class Certification

24 As the preceding facts make clear, Objectors are wrong that their “new” evidence, three
25 publicly-available court decisions from 2010, “has not been subjected to any evidentiary scrutiny or
26 adversarial process.” (Mot. at 2.) This is true even considering only Plaintiffs’ class certification motion
27 in this case. Contrary to Objectors’ assertion, Ferrero’s Wilson Sonsini attorneys presumably chose not
28 to challenge Class Counsel’s adequacy after reviewing the full record and satisfying itself that such

1 efforts would be in vein, not because they missed it, as Objectors claim their counsel did in failing to
2 discuss these 2010 decisions in their clients' June 8, 2012 objection.

3 **3. Objectors Have Not Demonstrated Grounds for Relief Under Rule 60(b)**

4 Objectors assert that “[v]acatur is appropriate for all six reasons permitted under Fed. R. Civ. P.
5 60.” (Mot. at 1.) But while they pay lip service to each prong (*id.* at 2-3), Objectors only discuss Rule
6 60(b)(2) (*see* Mot. at 2-7), which permits a court to vacate a judgment where there is “newly discovered
7 evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial
8 under Rule 59(b).” Fed. R. Civ. P. 60(b)(2). Aside from this, they make no efforts to explain with any
9 specificity why they qualify for Rule 60(b) relief. Despite Objectors’ failure to discuss the standards on
10 which they purport to rely, we take each prong of Rule 60(b) in turn.

11 a. Objectors Do Not Assert Any “Mistake, Inadvertence, Surprise, or Excusable
12 Neglect” Justifying Vacatur (Fed. R. Civ. P. 60(b)(1))

13 Without explanation, Objectors state that “to the extent the allegations of misconduct are
14 proved, this would be a basis for vacating the judgment under either of Fed. R. Civ. P. 60(b)(1), (3), (5),
15 or (6).” (Mot. at 3.)

16 “[F]or purposes of Rule 60(b), ‘excusable neglect’ is understood to encompass situations in
17 which the failure to comply with a filing deadline is attributable to negligence.” *Pioneer Inv. Servs. Co.*
18 *v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 394 (1993). The determination of whether neglect is
19 excusable “is at bottom an equitable one, taking account of all relevant circumstances surrounding the
20 party’s omission.” *Id.* at 395 (discussing Bankr. R. 9006(b) and laying out a four-factor test: “[a]
21 danger of prejudice . . . , [b] the length of the delay and its potential impact on judicial proceedings,
22 [(c)] the reason for the delay, including whether it was within the reasonable control of the movant, and
23 [(d)] whether the movant acted in good faith”); *see also Briones v. Riviera Hotel & Casino*, 116 F.3d
24 379, 381 (9th Cir. 1997) (applying the Supreme Court’s *Pioneer* factors to Fed. R. Civ. P. 60(b));
25 *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir. 2000) (applying four *Pioneer* factors to
26 motion for relief under Rule 60(b)(1)). Rule 60(b)(1) is most often used to seek vacatur of a default
27 judgment, not reconsideration of a court’s decision granting final approval to a class action settlement
28 and overruling an objection to class counsel’s adequacy. *See, e.g., Brandt v. Am. Bankers Ins. Co.*, 653

1 F.3d 1108, 1110 (9th Cir. 2011) (Gonzales, J., sitting by designation).

2 Although Objectors provide no explanation of how “to the extent the allegations of misconduct
3 are proved” this would constitute a “mistake, inadvertence, surprise, or excusable neglect,” Fed. R. Civ.
4 P. 60(b)(1), we take them to mean that the Court’s two decisions holding that the Weston Firm was
5 adequate class counsel was supposedly the result of the *Court’s* mistake. In determining the Weston
6 Firm was adequate Class Counsel, however, the Court did not err because the accusations of
7 misconduct are false and do not weigh against the firm’s adequacy, as several other courts have held.
8 *See Wastequip*, 2012 U.S. Dist. LEXIS 97663, at *4 (denying Rule 60(b) motion where “the Court did
9 not err in granting the [underlying] motion”); *see also Technica II*, 2012 U.S. Dist. LEXIS 67219, at *5-
10 6 (“A motion for reconsideration should not be granted unless . . . the court committed clear error or the
11 initial decision was manifestly unjust . . .”).

12 In addition, the false accusations concern supposed occurrences in 2010, in an unrelated case,
13 and thus do not inform the question of adequacy here. *C.f. Yumul*, 2010 U.S. Dist. LEXIS 116960, at
14 *12 (denying motion to disqualify Weston Firm on basis of Beck & Lee’s accusations in part because
15 they “do not specifically concern this case”). (*Compare* Mot. at 4 n.1 (noting Judge Ware held that the
16 Weston Firm’s dispute with Beck & Lee did not “destroy adequacy” in *Unilever* because “the
17 allegations related to a different case . . .”).)¹⁰

18 To the extent that Objectors assert their *counsel’s failure* to address these 2010 court decisions
19 in their objection was a result of “mistake, inadvertence, surprise, or excusable neglect,” Fed. R. Civ. P.
20 60(b)(1), this is wrong: “neither ignorance nor carelessness on the part of the litigant or his attorney
21 provide grounds for relief under Rule 60(b)(1).” *Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*,

22 _____
23 ¹⁰ Objectors’ motion is interspersed with contentions that the issues raised in the three 2010 decisions
24 they cite are emblematic of the Weston Firm’s practices. (*See, e.g.*, Mot. at 6 (“If the settlement is
25 reversed, it appears—based on counsel’s prior conduct and *modus operandi*—that they will force years
26 of litigation regarding any effort to collect the fee.”), 7 (“Based on this conduct it is reasonable to infer
27 something similar occurred in this case.”).) The reality is that each of the decisions relate to fallout
28 from the firm’s termination of Beck & Lee, and that the Weston Firm has otherwise worked
cooperatively and successfully with co-counsel on behalf of their clients in many other cases, including
firms like Lief Cabrasser Heimann & Bernstein, LLP; Schubert Jonkheer & Kole LLP; Casey, Gerry,
Schenk, Francavilla, Blatt & Penfield LLP; Hiden, Rott & Oertle, LLP; Milstein Adleman, LLP; and of
course, co-counsel here, the Law Offices of Ronald A. Marron, APLC.

1 139 F.3d 664, 666 (9th Cir. 1997) (quoting *Engleson*, 972 F.2d at 1043 (citation and internal quotations
2 omitted)); *see also Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004) (“As a general rule,
3 parties are bound by the actions of their lawyers, and alleged attorney malpractice does not usually
4 provide a basis to set aside a judgment pursuant to Rule 60(b)(1).”).

5 b. Objectors Do Not Have “Newly Discovered Evidence” Justifying Vacatur (Fed.
6 R. Civ. P. 60(b)(2))

7 “A rule 60(b)(2) motion can be made where newly discovered evidence *would probably produce*
8 *a different result.*” *Waters v. Hollywood Tow Serv.*, 2011 U.S. Dist. LEXIS 132535, at *3 (C.D. Cal.
9 Nov. 15, 2011) (emphasis added) (citing *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093
10 (9th Cir. 2003)). Such evidence “must be material and cannot be merely cumulative or impeaching.” *Id.*
11 (citation omitted).

12 Not only is Objectors’ “newly discovered evidence” comprised of 2010 court decisions that
13 have been publicly available for more than two years, but Objectors admit they were aware of these
14 cases at the time they filed their objection. (Mot. at 3 (“[T]hese very cases . . . were cited by the Weston
15 firm [sic] in support of its motion to be appointed class counsel.”).) “Evidence is not newly discovered
16 if it was ‘in the possession of the party before judgment was rendered.’” *Waters*, 2011 U.S. Dist. LEXIS
17 132535, at *4 (quoting *Costal Trasnfer Co. v. Toyota Motor Sales, U.S.A., Inc.*, 833 F.2d 208, 212 (9th
18 Cir. 1987)).

19 In addition, Objectors’ “newly discovered evidence” is merely cumulative of the “evidence”
20 they offered in their objection that the Weston Firm was supposedly inadequate. Because it is false or
21 irrelevant, it is also immaterial. And Objectors’ “newly discovered evidence” would not “probably
22 produce a different result” because the same information has not prevented several other courts from
23 appointing the Weston Firm as lead and class counsel on many subsequent occasions, after each
24 carefully examined the evidence.

25 c. Objectors Have Not Identified Any “Fraud . . . Misrepresentation, or Misconduct
26 by an Opposing Party” Justifying Vacatur (Fed. R. Civ. P. 60(b)(3))

27 To prevail under Rule 60(b)(3), “the moving party must prove by clear and convincing evidence
28 that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct

1 complained of prevented the losing party from fully and fairly presenting the defense.” *Casey*, 362 F.3d
2 at 1260 (quoting *De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000)). The
3 fraud must “not be discover-able by due diligence before or during the proceedings.” *Id.* (quoting *Pac.*
4 *& Arctic Ry. And Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991)).
5 Further, the “circuit’s precedent contemplates a high[] level of culpability”: the fraud must “defile the
6 court” and “prevent[] the judicial machinery from performing . . . its impartial task of adjudging cases
7 that are presented for adjudication.” *United States v. Chapman*, 642 F.3d 1236, 1241 (9th Cir. 2011)
8 (internal quotations and alteration omitted) (quoting *Latshaw v. Trainer Wortham & Co.*, 452 F.3d
9 1097, 1104 (9th Cir. 2006) (quoting *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1988))).
10 Misconduct that does not “amount to a ‘clear attempt to defile the court,’ or cause ‘a charade fraught
11 with concealed’ motives” does not “ris[e] to the level of a fraud on the court” under Rule 60(b)(3). *Id.*
12 (quoting *Dixon v. Comm’r*, 316 F.3d 1041, 1047 (9th Cir. 2003)).

13 Objectors have not demonstrated by “clear and convincing evidence,” or even identified or
14 discussed any “fraud” that led them to “lose” their argument that the Settlement was objectionable and
15 that Judgment should not be entered, much less a fraud meeting the high standards of Rule 60(b)(3).
16 The closest they come is arguing that “[s]ubsequent developments in the[] cases” from 2010 that their
17 counsel just discovered “were cited misleadingly to the court” (Mot. at 3.) That premise is false,
18 since none of those cases weigh against the Weston Firm’s adequacy as Class Counsel.

19 To the extent that Objectors assert the *discredited* accusations of Beck constitute “misconduct”
20 within the meaning of Rule 60(b)(3), this is also wrong. Even if the Weston Firm had engaged in the
21 accused misconduct in 2010, it would have been unrelated to “obtain[ing]” the verdict (or Judgment)
22 here, and did not otherwise prevent Objectors from “fully and fairly” presenting their objections to the
23 Settlement. Nor have Objectors demonstrated that the “evidence” they cite—“the[] very cases that were
24 cited by the Weston firm [sic] in support of its motion to be appointed class counsel” (Mot. at 3)—was
25 “not discover-able by due diligence.” To the contrary, Objectors admit that Class Counsel expressly
26 identified these cases in prior case pleadings that they reviewed, and thus they did not even need to
27 “discover” them.

28 Objectors’ motion is, rather, “a clear attempt to relitigate the issue” of Class Counsel’s

1 adequacy, raised in their objection, but “the merits of a case are not before the court on a Rule 60(b)
2 motion” *Casey*, 362 F.3d at 1261.

3 d. Objectors Have Not Shown the Judgment is Void (Fed. R. Civ. P. 60(b)(4))

4 “A final judgment is ‘void’ for purposes of Rule 60(b)(4) only if the court that considered it
5 lacked jurisdiction, either as to the subject matter of the dispute or over the parties to be bound, or acted
6 in a manner inconsistent with due process of law.” *United States v. Berke*, 170 F.3d 882, 883 (9th Cir.
7 1999) (internal citations omitted). “There is no question of discretion on the part of the court when a
8 motion is under Rule 60(b)(4).” *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De*
9 *Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980).

10 For their argument that the “judgment is void,” Fed. R. Civ. P. 60(b)(4), Objectors cite
11 *Crawford v. Honig*, 1992 U.S. Dist. LEXIS 13677 (N.D. Cal. Aug. 31, 1992). (See Mot. at 1-2.) That
12 case is inapposite, involving a modification to an injunction affecting individuals who were not
13 represented in the underlying action, entered with a “lack of evidence and absence of any discussion . . .
14 .” See *Crawford*, 1992 U.S. Dist. LEXIS 13677, at *28. The court held this procedural failure violated
15 due process. By contrast, had “the modified injunction affected only those whose interests had been
16 fully examined at the trial, or had evidence been presented to support the new injunction, the
17 modification might have withstood the instant challenge.” *Id.*; see also *Crawford v. Honig*, 37 F.3d 485,
18 488 (9th Cir. 1994) (upholding lower court’s decision granting Rule 60(b)(4) motion because “the 1986
19 modification [forbidding all I.Q. testing of African-American children referred for special education
20 assessment] was not supported by the factual findings in the 1979 proceedings” where “the focus of the
21 district court’s inquiry [in 1979] was the disproportionate enrollment of African-American children in
22 dead-end E.M.R. classes, not the use of I.Q. tests generally”).

23 Here, in contrast to the cursory proceeding in *Crawford*, Class Counsel’s adequacy was vetted
24 on three separate occasions: when they moved for appointment as interim class counsel;¹¹ when they
25

26 ¹¹ See *Hohenberg v. Ferrero U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 38471, at *6 (S.D. Cal. Mar. 22,
27 2011) (Applying factors set forth in Rule 23(g) and concluding that “[e]ach proposed class counsel
28 appears to be well qualified to represent the interests of the purported class and to manage this
litigation.”).

1 filed Plaintiffs’ contested motion for class certification;¹² and when Objectors presented their arguments
2 that Class Counsel was inadequate.¹³ And unlike in *Crawford*, there are no non-represented persons
3 affected by the Court’s determination that Class Counsel is adequate. Rather, only class members who,
4 like Objectors, had both the opportunity to opt-out and to object, were affected. *See In re Diet Drugs*
5 *Prods. Liab. Litig.*, 431 F.3d 141, 146 (3d Cir. 2005) (“Class members are not . . . entitled to unlimited
6 attacks on the class settlement. Once a court has decided that the due process protections did occur for a
7 particular class member or group of class members, the issue may not be relitigated.”); *accord. Skilstaf,*
8 *Inc. v. CVS Caremark Corp.*, 669 F.3d 1005 (9th Cir. 2012) (affirming lower court’s denial of Rule
9 60(b)(4) motion by party affected by class action settlement provision comprising covenant not to sue
10 and claiming inadequate notice violated of due process).

11 Although Objectors have not shown that the Weston Firm is, or ever was, inadequate Class
12 Counsel, even if they had, this prong would not support vacatur, since the Court also appointed the Law
13 Offices of Ronald A. Marron as Class Counsel, and Objectors do not assert that the Marron firm
14 inadequately represented their interests.

15 e. Objectors Have Not Shown that Applying the Judgment Prospectively is No
16 Longer Equitable (Fed. R. Civ. P. 60(b)(5))

17 Rule 60(b)(5) permits a party to be relieved of a final judgment when it “has been satisfied,
18 released or discharged,” is “based on an earlier judgment that has been reversed or vacated,” or where
19 “applying it prospectively is no longer equitable.” Fed. R. Civ. P. 60(b)(5). Objectors invoke only this
20 third portion of the rule. (*See Mot.* at 2 (mistakenly referring to subsection 4).)

21 A party bringing a motion under Rule 60(b)(5) must establish that a significant change in
22 circumstances warrants revision of the judgment. *Bellevue Manor Assocs. v. United States*, 165 F.3d
23 1249, 1255 (9th Cir. 1999). The rule “codifies the long-established principle of equity practice that a

25 ¹² *See In re Ferrero Litig.*, 278 F.R.D. 552, 559 (S.D. Cal. 2011) (“The Court concludes that Plaintiffs
26 and their counsel would adequately represent the putative class.”).

27 ¹³ *See In re Ferrero Litig.*, 2012 U.S. Dist. LEXIS 94900, at *8, *11-12 (S.D. Cal. July 9, 2012)
28 (overruling objections to class counsel’s adequacy and “reaffirm[ing] its prior order certifying the Class
and appointing Class Counsel and Class Representative[s].”)

1 court may, in its discretion, take cognizance of changed circumstances and relieve a party from a
2 continuing decree,” *Gilmore v. California*, 220 F.3d 987, 1007 (9th Cir. 2000). Accordingly, the rule is
3 usually limited to *injunctions*, as where changed circumstances makes an enjoined party’s compliance
4 “substantially more onerous, unworkable because of unforeseen obstacles, detrimental to the public
5 interest, or legally impermissible.” *SEC v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2001). It “applies only
6 to those judgments that have prospective application.” *Harvest v. Castro*, 531 F.3d 737, 748 (9th Cir.
7 2008).

8 Objectors have not explained how Rule 60(b)(5) applies in this case, except to generally assert
9 that Beck’s accusations of misconduct “[if] proved, . . . would be a basis for vacating the judgment
10 under” Rule 60(b)(5). (Mot. at 3.) This is an inapt argument, as Rule 60(b)(5) requires Objectors to
11 demonstrate how *their* compliance with the Judgment is inequitable. And while those 2010 accusations
12 have been discredited, Objectors also fail to show that they constitute a “change of circumstances” post-
13 dating the Court’s July 9, 2012 Judgment.

14 f. Objectors Have Not Shown Any Other Reason That Justifies Vacatur
15 (Fed. R. Civ. P. 60(b)(6))

16 Rule 60(b)(6) “is to be ‘used sparingly as an equitable remedy to prevent manifest injustice and
17 is to be utilized only where extraordinary circumstances prevented a party from taking timely action to
18 prevent or correct an erroneous judgment.’” *Harvest* 531 F.3d at 749 (quoting *Latshaw* 452 F.3d at
19 1103 (quoting *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005))); *see also Dish*
20 *Network*, 2012 U.S. Dist. LEXIS 146838, at *4 (“That last prong is ‘used sparingly as an equitable
21 remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances
22 prevented a party from taking timely action to prevent or correct an erroneous judgment.’” (quoting
23 *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007))).

24 A Rule 60(b)(6) argument may “not [be] premised on one of the grounds for relief enumerated
25 in clauses (b)(1) through (b)(5).” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863
26 (1988); *Lafarge Conseils et Etudes S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th
27 Cir. 1986) (noting that Rule 60(b)(6) is residual and exclusive of the preceding subsections); *Kelly v.*
28 *Provident Life & Accident Ins. Co.*, 734 F. Supp. 2d 1085, 1105 (S.D. Cal. 2010) (“Relief under Rule

1 60(b)(6) is only available if none of the other categories apply and may only be granted in extraordinary
2 circumstances.” (citations omitted)); *Waters*, 2011 U.S. Dist. LEXIS 132535, at *4 (“Rule 60(b)(6) does
3 not apply where other sections apply.” (citation omitted)).

4 “A party moving for relief under Rule 60(b)(6) ‘must demonstrate both injury and circumstances
5 beyond his control that prevented him from proceeding with the action in a proper fashion.’” *Harvest*,
6 531 F.3d at 749 (quoting *Latshaw*, 452 F.3d at 1103). *See also Llewellyn*, 139 F.3d at 666 (relief under
7 Rule 60(b)(6) “requires a showing of ‘extraordinary circumstances.’” (quoting *Ackerman v. United*
8 *States*, 340 U.S. 193, 199-201 (1950))); *Burgess v. Sandaval*, 2012 U.S. Dist. LEXIS 149248, at *2 (D.
9 Nev. Oct. 16, 2012) (“Relief under Rule 60(b)(6) requires a finding of extraordinary circumstances.”
10 (citing *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985))).

11 Objectors have demonstrated neither injury nor “circumstances beyond [their] control.” They
12 have not demonstrated injury, because none of the 2010 decisions they cite would have led the Court to
13 find the Weston Firm inadequate, nor bolstered their objection to the firm’s adequacy. And their
14 counsel’s failure to carefully review the Weston Firm’s litigation history while asserting an objection to
15 their adequacy was not “beyond their control” because Objectors could have hired competent counsel,
16 or their attorneys could have located and discussed these 2010 court decisions by exercising a basic
17 level of professional skill. *See Reynolds v. Lomas*, 2012 U.S. Dist. LEXIS 143508, *4-5 (N.D. Cal.
18 Sept. 28, 2012) (attorney mistake is not an “extraordinary circumstance” warranting relief under Rule
19 60(b)(6)).

20 **II. THE COURT SHOULD DENY OBJECTORS’ REQUEST TO MODIFY THE**
21 **JUDGMENT OR REQUIRE THAT ATTORNEYS’ FEES BE HELD IN TRUST**

22 The Court should also deny Objectors’ request that Class Counsel “file proof that the fees are
23 being kept in trust pending appeal, or that the judgment be modified, the quick-pay provisions stricken,
24 and the funds be ordered held by the Clerk of the Court, or a special master” (Mot. at 7.)

25 **A. There is No Legal Requirement that Fees Awarded Be Held in Trust**

26 Objectors contend that attorneys’ fees must be held in trust because their appeal constitutes a fee
27 “dispute” governed by Rule 1.15 of the ABA Model Rules of Professional Conduct, and Rules 3-700
28 and 4-100 of the Rules of Professional Conduct of the State Bar of California. (Mot. at 7.) Without

1 discussing any of these rules specifically, they assert that all three rules “impose [the] obligation[] on
2 attorneys when a fee is disputed . . . to maintain those fees in trust until the fee dispute is resolved.”
3 (*Id.*) Their conclusory assertion is wrong.

4 Contrary to Objectors’ contention, “the ABA Model Rules . . . do not establish the ethical
5 standards in California, as they have not been adopted in California and have no legal force of their
6 own.” *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 833 n.10 (9th Cir. 2009) (quoting *State*
7 *Compensation Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 655-56 (1999)). And while the ethical
8 duties of California attorneys *are* governed by the Rules of Professional Conduct, neither of the rules
9 Objectors cite (3-700 and 4-100) require fees awarded to Class Counsel upon the settlement of a class
10 action to be held in trust because an unsuccessful objector takes an appeal.

11 Rule 3-700 governs “Termination of Employment,” and its only requirement respecting fees is
12 that, when an attorney is terminated by his client, he must “[p]romptly refund any part of a fee paid in
13 advance that has not been earned.” Cal. R. Prof. Conduct 3-700(D)(2). This rule has no application here
14 because Class Counsel have neither been terminated, nor are in possession of any “unearned” fees.
15 (*Accord* Dkt. No. 127 at 6 ¶ 11 (holding Plaintiffs are prevailing parties entitling their counsel to “a
16 reasonable fee and expense award for their work,” and awarding fees and costs).)

17 Rule 4-100 governs an attorney’s duty to “Preserve [the] Identify of Funds and Property of a
18 Client.” One provision of the Rule states that:

19 All funds received or held for the benefit of clients by a member or law firm . . . shall be
20 deposited in one or more identifiable bank accounts labeled “Trust Account,” “Client’s
21 Funds Account” or words of similar import No funds belonging to the member or
22 the law firm shall be deposited therein or otherwise commingled therewith except as
23 follows: . . . In the case of funds belonging in part to a client and in part presently or
24 potentially to the member or the law firm, the portion belonging to the member or law
25 firm must be withdrawn at the earliest reasonable time after the member’s interest in that
portion becomes fixed. However, when the right of the member or law firm to receive a
portion of trust funds is disputed by the client, the disputed portion shall not be
withdrawn until the dispute is finally resolved.

26 Cal. R. Prof. Conduct 4-100(A)(2). Although Objectors argue without authority that their appeal is a
27 “dispute” governed by this Rule, it does not apply because: (1) Objectors are not Class Counsels’
28

1 “clients” within the meaning of the Rule;¹⁴ (2) Class Counsel has not received any funds held for the
2 benefit of their clients, or absent class members, but instead only attorneys’ fees and costs awarded by
3 the Court; (3) because this is a class action settlement in which a common fund was established for the
4 benefit of absent class member-claimants, the common fund has always been held in trust by the
5 settlement administrator, as authorized by the Court, not in a Client Trust Fund maintained by Class
6 Counsel; and (4) even if absent class members *were* Class Counsels’ clients, the Court has jurisdiction
7 over the common fund established on their behalf, and has authorized the distribution of fees and
8 administrative costs from the fund in accordance with the Settlement Agreement.

9 Consistent with Objectors’ lack of authority, Class Counsel’s search has not located a single
10 California state or federal case applying either Rule 3-700(D) or 4-100(A) (or Model Rule 1.15) in an
11 analogous situation involving a class action settlement or an objector’s appeal thereto, nor any case
12 otherwise requiring that fees awarded pursuant to a class action settlement’s final approval be held in
13 trust—for any reason—pending an objector’s appeal.

14 **B. Objectors Have no Factual Basis or Standing to Request “Proof” That Fees are Being**
15 **Held in Trust**

16 Objectors contend that the settlement agreement’s “quick pay” provision “is of significant
17 concern” such that the Court should order Class Counsel to “file proof that the fees are being held in
18 trust pending the appeal” (Mot. at 7.) But their argument relies entirely on Judge Ware’s holding in
19 *Unilever* and the circumstances that initially concerned Judge Ware, a heated dispute between former
20 co-counsel *prior* to any fee award, are not present here. And contrary to Objectors’ contention, that
21 dispute was resolved *without* additional “litigation” (*id.*).

22 ¹⁴ See *In re Cmty. Bank of N. Va. & Guar. Nat’l Bank of Tallahassee Second Mortg. Loan Litig.*, 418
23 F.3d 277, 313 (3d Cir. 2005) (“[C]lass counsel do not possess a traditional attorney-client relationship
24 with absent class members. . . . ‘While lead counsel owes a generalized duty to unnamed class
25 members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship
26’” (citations omitted)), *vacated on other grounds*, 622 F.3d 275 (3d Cir. 2010); *accord In re Nig.*
27 *Charter Flights Litig.*, 2011 U.S. Dist. LEXIS 155180, at *14 (E.D.N.Y. Aug. 25, 2011) (noting that in
28 common fund settlements, Class Counsel “recovers a common fund for the benefit of persons *other*
than himself or his client” (quotation omitted)(emphasis added)); *Singletery v. Equifax Info. Servs.,*
LLC, 2011 U.S. Dist. LEXIS 156215, at *69-70 (N.D. Ala. Sept. 21, 2011) (“Class representatives
serve the important fiduciary role of exercising the independent judgment and decision-making
authority of the ‘client’ in the attorney-client relationship”).

1 In addition, “Federal courts . . . routinely approve settlements that provide for payment of
2 attorneys’ fees prior to final disposition in complex class actions.” *In re TFT-LCD (Flat Panel)*
3 *Antitrust Litig.*, 2011 U.S. Dist. LEXIS 154288, at *1 (N.D. Cal. Dec. 27, 2011) (collecting cases).
4 Objectors “speculative assertion” that the quick pay provision here is “inherently risky because counsel
5 may be unable to repay the fees if they are reversed or reduced on appeal. . . . has no basis in fact”
6 where “[t]he repayment requirements in the . . . settlement[] . . . make all plaintiffs’ counsel firms and
7 their equity owners jointly and severally liable for any repayment, and answerable to this Court,” which
8 is “more than adequate to protect the Class and Defendants.” *See id.* at *1-4 (rejecting objector’s
9 request that class counsel be required to post a letter of credit or other security). (*Compare Settlement*
10 *Agreement*, Dkt. No. 107-1 at 27-28 ¶¶ 52-53 (requiring personal guarantees that jointly and severally
11 obligate the principals of the Weston Firm and the Law Offices of Ronald A. Marron, APLC, to repay
12 any reduced or overturned fees).)

13 Moreover, aside from a small amount of the fee that was taken against the common fund
14 (\$85,920), Ferrero paid the fee award directly, and thus would be the only party with an interest in
15 recovering the vast majority of any fees reduced or overturned on appeal. Objectors lack standing to
16 assert any such interest by Ferrero because they would not be injured if Class Counsel defied an Order
17 of the Ninth Circuit Court of Appeals or this Court and refused to remit to Ferrero any amounts reduced
18 or reversed on appeal. But this is, of course, not a legitimate concern. Objectors have made “no showing
19 . . . that there has ever been a case where counsel, including counsel herein, have failed to repay fees
20 under such provisions. . . .” *TFT*, 2011 U.S. Dist. LEXIS 154288, at *3.

21 **C. Objectors’ Request that the Court “Modify” the Judgment is Untimely and Improper**

22 Although Objectors fail to cite the basis for their request, to the extent they seek relief that
23 would “modif[y]” the judgment (Mot. at 7), it is properly brought under Fed. R. Civ. P. 59(e).
24 “Amending a judgment after its entry [pursuant to Rule 59(e)] is ‘an extraordinary remedy which
25 should be used sparingly.’” *U.S. ex rel. Ramona Equip. Rentals, Inc. v. Carolina Cas. Ins. Co.*, 2011
26 U.S. Dist. LEXIS 149967, at *3 (S.D. Cal. Dec. 30, 2011) (Huff, J.) (citing *McDowell v. Calderon*, 197
27 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam)). “[T]he district court enjoys considerable
28 discretion in granting or denying the motion” and such “motions may be granted for four reasons: ‘(1) if

1 such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if
2 such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such
3 motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening
4 change in controlling law.” *Id.* (quoting *McDowell*, 197 F.3d at 1255 n.1 and *Allstate Ins. Co. v.*
5 *Herron*, 634 F.3d 1101, 1111 (9th Cir. 2001)).

6 **1. Objectors’ Motion to Alter or Amend the Judgment is Untimely**

7 Rule 59(e) provides that “[a] motion to alter or amend a judgment must be filed no later than 28
8 days after entry of the judgment.” Objectors’ November 5, 2012 Motion was filed 119 days after the
9 July 9 Judgment. It is therefore untimely.

10 **2. The Court Lacks Jurisdiction to Grant the Relief Objectors Request**

11 Even if Objectors’ motion to modify the judgment were timely and proper, it seeks relief the
12 Court cannot provide. The attorney fee provision over which Objectors complain is a material term of
13 the parties’ settlement. District courts lack authority to strike individual components of a class action
14 settlement for which final approval is sought. Rather, “[i]t is the settlement taken as a whole, rather than
15 the individual component parts, that must be examined for overall fairness,” and courts “cannot delete,
16 modify or substitute certain provisions. The settlement must stand or fall in its entirety.” *Dennis v.*
17 *Kellogg Co.*, --- F.3d ---, 2012 U.S. App. LEXIS 18576, at *23 (9th Cir. Sept. 4, 2012) (quoting *Hanlon*
18 *v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (internal quotation marks omitted)); *see also*
19 *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989) (“[C]ourts are not permitted to modify settlement
20 terms or in any manner to rewrite agreements reached by parties.”).

21 **CONCLUSION**

22 The Court should deny Objectors’ Motion.
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1 DATED: November 16, 2012

Respectfully Submitted,

2 /s/ Jack Fitzgerald

3 Jack Fitzgerald

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