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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: FERRERO LITIGATION

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

REPLY 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

In point I.A.1 class counsel argue that objectors cannot file the motion because they are not "parties." There is a split of authority on this. For instance, in the LCD litigation, pending in the Northern District, objectors are being treated like parties for all purposes, including discovery. Nonetheless, that is why Pridham asked for leave to intervene as part of her relief – arguing that to the extent she needs to be a "party" to file the Rule 60 motions she should permissively, or of right, be granted leave to do so. Class Counsel do not contest this relief. (See Response, p. 5, n.3).

In point I.A.2 Class counsel argue it is a motion to reconsider. This is needless quibbling over nomenclature. All Rule 60 motions are, by nature, "reconsideration" of some type – and local Rule 7 does not purpose to alter Rule 60. The motion is properly brought under Rule 60 as it presents new grounds for relief, in addition to meeting other factors justifying relief under the Rule. Pridham's original objection urged the court to look at the way the case (and counsel appointment) was "manufactured" and to inquire further into suspicious admissions in the depositions about the retention. The issues regarding the articulated concerns (by a judicial officer) about the firm's ability to hold funds in trust, coupled with the firm's repeated issues about making deceptive statements in pleadings, as well as the (violated) professionalism pledges Class Counsel were ordered to sign – all militate a second look. Rule 60 allows and requires that second look.

Professor Mullenix, in Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes, 57(5) Vanderbilt L.R. 1687 (2004) reminds us that the Supreme Court held adequacy must be examined at all stages, and urged courts to "refrain from certifying class actions on paper records or legal argument from counsel," "require live testimony from class representatives," "probe beyond self-serving affidavits in support of appointment as class counsel," engage in a "probing examination of credentials," and "cease the practice of requesting plaintiff-drafted certification orders that result in conclusory findings of adequacy." Id. at 1442-43.

Class counsel claim that the motion is untimely because the facts discovered were of public record, but this reverses the burden. It is Class Counsel's burden to make an adequate factual record on adequacy, not on the objector to create a question of fact. Moreover, Pridham's counsel specifically raised adequacy at the fairness hearing, and the court stated the order would address the issue. The final approval order never addressed the adequacy

issue. And the court certainly was never asked to examine the serious questions raised by the present motion – these are not minor concerns, they deserve some discovery and an evidentiary hearing.

Some judges have given the Weston firm a pass on inquiring into the allegations in the other cases, because there was no evidence of misconduct in the case before them. Class counsel point to the Gallucci decision (Class Counsel's Response, p. 10), for instance. There, the court stated:

> Objectors also present no credible evidence to support a finding that Class Counsel lack the qualifications to represent the Class in this action. Objectors submit two pieces of evidence on this point. The first is a case citation to a ruling by the Honorable Judge George H. Wu of the Central District as to the Weston Firm. In Red v. Kraft Foods, Inc., No. 10-cv-1028-GW (C.D. Cal.), Doc. # 212 at 16-17, Judge Wu found there was no basis for precluding the appointment of that firm as class counsel. The second is a citation to a ruling in a pending lawsuit filed by Objectors Fernandez, Martinez, O'Dell, Lanigan, and Rangel in the United States District Court, Central District of California. See Fernandez v. Boiron, Inc., et al., No. SACV-11-01867 (C.D. Cal.), Doc. # 66
> at 4-5. Class Counsel do not represent any parties in that case, and could not have submitted briefing on the issues considered by the Honorable Josephine S. Tucker. Further, Judge Tucker correctly deferred the decision on the fairness of the Settlement to this Court.

First, this statement was not accurate. The objectors in that case also presented evidence from Mejia v. Sears and Roebuck, 06-974 where the court noted Mr. Marron had been sued for breaching his fiduciary duties to clients and that intervenors should not be forced to wait "until it is too later to protect not only their interest but those of other class members." Second, in the Gullucci case itself, Mr. Marron had sent a CLRA letter to two defendants "before he even had a client." There, it appears, they cut and pasted many of the allegations of another case, Gonzales, and then reverse-auctioned its settlement to defendants, prompting objections from Gonzales' counsel. Contrary to helping Class Counsel's argument, the Gallucci decision provides another reason why discovery and a hearing on adequacy is required.

Class counsel deny many of the allegations – but a hearing has never

been held, in this case, or evidently any other. A hearing should finally be held, once and for all. That is all Pridham asks; it is what the law requires. Without discovery, Pridham cannot further contest Class Counsel's conclusory assertions and denials (see, e.g., the statements in footnote 10 – all asserted with no evidentiary support). Pridham urges this court to take adequacy seriously, and allow – at a minimum – discovery into the serious allegations that have been repeatedly made in a number of cases, but apparently never subjected to an evidentiary hearing on the issue of adequacy. The irregularties in this case (pointed to by Pridham in her original objection), coupled with the revelations about these other cases mandate further scrutiny.

Finally, it should be noted the request for an indicative ruling under Rule 62.1 is not contested and should be granted.

Dated: November 19, 2012

By: /s/ Grenville Pridham
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