UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE FERRERO LITIGATION

CASE NO. 11-CV-205-H (KSC)

ORDER DENYING MOTION TO VACATE FINAL APPROVAL OF CLASS SETTLEMENT

On November 5, 2012, Objectors Courtney Drey and Andrea Pridham filed a motion to vacate the Court's order approving the class settlement pursuant to Federal Rule of Civil Procedure 60(b). (Doc. No. 145-1.) Plaintiffs Athena Hohenberg and Laura Rude-Barbato and Defendant Ferrero USA, Inc. filed a joint opposition on November 19, 2012. (Doc. No. 151.) Drey and Pridham filed their reply on November 28, 2012.[1] (Doc. No. 152.) For the reasons set forth below, the Court denies Objectors' motion.

Background

This is a consolidated consumer class action lawsuit brought on behalf of people who have purchased Ferrero's Nutella® spread after relying on allegedly deceptive and misleading labeling and advertisements. (Doc. No. 14, Cons. Compl.) After two settlement conferences before the magistrate judge, as well as a private mediation with a retired district judge, the parties reached an agreement to settle the claims. (Doc. No. 127 at p. 6.) On January 23, 2012,

[1]Per Civil Local Rule 7.1.e.3, Objectors were required to file their reply on or before November 26, 2012. The Court exercises its discretion pursuant to Civil Local Rule 1.1.d and accepts Objectors' untimely filing. However, the Court instructs Objectors and their counsel to strictly adhere to this Court's local rules if they should make any subsequent filings in this case.

the Court granted preliminary approval to the proposed settlement. (Doc. No. 114.) On June 8, 2012, class members Courtney Drey and Andrea Pridham filed objections to the proposed settlement, including an objection as to the adequacy of the Weston Firm to represent the class. (Doc. No. 123.) On July 9, 2012, the Court held a fairness hearing to decide whether to grant final approval to the proposed settlement. (Doc. No. 128.) Counsel for Objectors Drey and Pridham appeared at the hearing. (Doc. No. 127.) After considering all objections, the Court granted final approval of the proposed settlement. (Doc. No. 127.) Objectors Drey and Pridham filed a notice of appeal on August 7, 2012. (Doc. No. 130.)

Discussion

I. Jurisdiction

"Once an appeal is filed, the district court no longer has jurisdiction to consider motions to vacate judgment." Davis v. Yageo Corp., 481 F.3d 661, 685 (9th Cir. 2007). "However, a district court may entertain and decide a Rule 60(b) motion after notice of appeal is filed if the movant follows a certain procedure, which is to 'ask the district court whether it wishes to entertain the motion, or to grant it,'" and then file a motion in the appellate court to remand the case. Id. (quoting Gould v. Mut. Life Ins. Co. of N.Y., 790 F.2d 769, 772 (9th Cir. 1986)). This procedure is often referred to as seeking an indicative ruling. Fed. R. Civ. P. 62.1 advisory committee's note. Upon a request for an indicative ruling, the district court may "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1.

As Objectors Drey and Pridham filed their Rule 60(b) motion after they filed a notice of appeal, the Court lacks jurisdiction to grant the motion. Davis, 481 F.3d at 685. Therefore, the Court's jurisdiction is limited to that provided in Rule 62.1.

II. Rule 60(b) Motion to Vacate

The decision whether to vacate a prior judgment is committed to the sound discretion of the district court. Price v. Seydel, 961 F.2d 1470, 1473 (9th Cir. 1992). Rule 60(b) provides that a court "may relieve a party or its legal representative from a final judgment, order, or

proceeding"[2] on the following grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect;
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> (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);
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> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
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> (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.

Fed. R. Civ. P. 60(b).

Objectors argue that newly-discovered evidence seriously calls into question the adequacy of the Weston Firm to represent the class. (Doc. No. 145-1.) The newly-discovered evidence includes a September 14, 2010 order in Red v. Unilever PLC, No. 12-387, 2010 WL 3629689 (N.D. Cal. Sep. 14, 2010), an August 24, 2010 order in Levitt v. Yelp!, No. 1-1321/10-2351 (N.D. Cal. Aug. 24, 2010), and a September 30, 2010 order in The Weston Firm, P.C. v. Reese Richman LLP, No. 10-1694 (S.D. Cal. Sep. 30, 2010). Id. As to Unilever, Objectors highlight allegations made by the Beck & Lee firm that the Weston Firm, in a different case, had offered a "kickback" to an individual in return for serving as a named plaintiff, had promised one of its paralegals a "finder's fee" in exchange for "signing up" a named plaintiff, and had compensated its non-lawyer employees on a percentage basis from settlement proceeds. (Doc. No. 145-1, Ex. A at p. 2.) Objectors also point out that the Court expressed concerns regarding the Weston Firm's ability to hold fees in trust. (Id. at p. 5) (noting the Weston Firm's fee dispute with the Beck & Lee firm and appointing a special master). As to Yelp!, Objectors point out that the court noted the inexperience of the Weston Firm in obtaining class certification and subsequent litigation and appointed the Ongaro firm as class counsel. (Doc. No. 145-1, Ex. B at p. 2.) As to Weston Firm, Objectors highlight the

[2]Objectors request leave to intervene pursuant to Rule 24 in the event that as non-parties they lack standing to bring their 60(b) motion. (Doc. No. 145-1 at p. 8.) The parties do not oppose. (Doc. No. 151 at p. 5, n.3.) Therefore, the Court grants Objectors request to intervene for the limited purpose of maintaining their 60(b) motion. Fed. R. Civ. P. 24(b).

fact that the Court expressed concerns that the Weston Firm "circumvent[ed] the rulings of other district courts" in requesting a temporary restraining order enjoining the Beck & Lee firm from communicating with clients of the Weston Firm. (Doc. No. 145-1, Ex. C at p. 3.) Objectors argue that this newly-discovered evidence, coupled with the issues raised in their prior objections, raises a substantial question that the Weston Firm engaged in similar misconduct in this case. (Doc. No. 145-1 at p. 7.)

After considering Objectors' arguments and the issues discussed in the cases cited, the Court concludes that Objectors have failed to raise a substantial question as to the adequacy of the Weston Firm in this case. The alleged misconduct of the Weston Firm in all three cases cited by Objectors stemmed from the circumstances surrounding Weston Firm's various disputes with the Beck & Lee firm. (See Doc. No. 145-1, Exs. A-C.) This litigation appears to be outside the scope of that dispute, and there is no evidence to suggest that the Weston Firm engaged in any misconduct in this case. The issues raised in the "newly-discovered evidence" are insufficient to raise a question of impropriety here.

In addition, the Court previously considered and overruled objections to the adequacy of the Weston Firm. (Doc. No. 127.) The argument that the Weston Firm is not experienced with class certification and subsequent litigation is mitigated by the fact that the parties have reached a settlement that the Court determined "provid[es] an appropriate remedy to class members" taking "into account the strength of Defendant's defenses and obstacles to class-wide recovery." (Doc. No. 127 at p. 7.) Thus, the Weston Firm has demonstrated its ability to obtain appropriate relief, allegations of inexperience notwithstanding.

Conclusion

For the foregoing reasons, the Court denies Objectors' motion to vacate its prior judgment granting final approval to class settlement.

IT IS SO ORDERED.

DATED: December 3, 2012

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT