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Interim Class Counsel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE FERRERO LITIGATION

Case No. 3:11-cv-00205-H-CAB
Pleading Type: Class Action
Action Filed: February 01, 2011

SUPPLEMENTAL STATEMENT OF AUTHORITY IN SUPPORT OF CLASS CERTIFICATION (PURSUANT TO ORDER AT HEARING)

Judge: Hon. Marilyn L. Huff
Date: November 7, 2011
Time: 10:30 a.m.
Location: Courtroom 13

Wal-Mart has not turned class certification into a "mini-trial," and expert evidence is not necessary to show the predominance of common questions in this routine consumer fraud case under California's UCL, FAL and CLRA. In Ellis v. Costco Wholesale Corp., the Ninth Circuit cautioned: "Costco seems to equate a 'rigorous analysis' with an in-depth examination of the underlying merits . . . . This is incorrect. The district court is required to examine the merits . . . only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims. To hold otherwise would turn class certification into a mini-trial. 2011 U.S. App. LEXIS 19060, at *29 n.8 (9th Cir. Sept. 16, 2011) (internal citations omitted). Here, "[u]nlike in Wal-Mart, where the injury suffered, discrimination, happened at the hands of different supervisors in different regions without the link of a common practice or policy, any injury suffered by a class member in this case stems from . . . a common advertising campaign that had little to no variation." Johnson v. Gen. Mills, Inc., 2011 U.S. Dist. LEXIS 103357, at *6 (C.D. Cal. Sept. 15, 2011) (denying motion for decertification in light of Wal-Mart and Stearns). Accord Youngblood v. Family Dollar Stores, Inc., 2011 U.S. Dist. LEXIS 115389, at *13-14 (S.D.N.Y. Oct. 4, 2011) ("Unlike the claims in Wal-Mart, Plaintiffs' [state law] claims do not require an examination of the subjective intent behind millions of individual employment decisions; rather, the crux of this case is whether the company-wide policies . . . violated Plaintiffs' statutory rights." (quotations and citation omitted)); Jermyn v. Best Buy Stores, L.P., 2011 U.S. Dist. LEXIS 104449, at *16 (S.D.N.Y. Sept. 15, 2011) (an allegation that defendant had a uniform policy "is precisely what is missing in [Wal-Mart]"); Public Employees Ret. Sys. of Miss. v. Merrill Lynch & Co, Inc., 2011 U.S. Dist. LEXIS 93222, at *26 (S.D.N.Y. Aug. 22, 2011) ("Wal-Mart has no effect on the commonality determination in this case. The common questions presented by this case—essentially, whether the Offering Documents were false or misleading in one or more respects—are clearly susceptible to common answers."); Smith v. Ceva Logistics U.S., Inc., 2011 U.S. Dist. LEXIS 111941, at *6-7 n.1 (C.D. Cal. Sept. 28, 2011) ("*Ellis* is inapposite because it raises commonality issues not present in this case."). See also Mathias v. Smoking Everywhere, Inc., 2011 U.S. Dist. LEXIS 121687, at *4-6 (E.D. Cal. Oc.t 20, 2011) (finding commonality and typicality met based on evidence of the content of Defendant's website, which was alleged to contain misleading statements); Galvan v. KDI Distribution, Inc., 2011 U.S. Dist. LEXIS 127602, at *7-8, 17-18 (C.D. Cal. Oct. 25, 2011). These cases represent just a small sample of the many post-Wal-Mart decisions similarly distinguishing the decision.

DATED: November 7, 2011

Respectfully Submitted,

/s/ Jack Fitzgerald
Jack Fitzgerald

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