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United States District Court,
C.D. California.

Ulti-Mate Connectors, Inc. et al.
v.
American General Life Insurance Co., et al.

Case No. SACV 14-1051-JLS (JPRx)
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Signed 05/18/2016

PROCEEDINGS: (IN CHAMBERS) ORDER (1) DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (Doc. 105), AND (2) DENYING AS MOOT PLAINTIFFS' MOTION FOR APPOINTMENT OF CLASS COUNSEL (Doc. 107)

Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE

***1** Before the Court is a motion for class certification filed by Plaintiffs Ulti-Mate Connectors, Inc., Bruce L. Billington, Thierry Pombart, and Stephen R. Brockman. (Mot., Doc. 105.) Defendants American General Life Insurance Company and Peter Mordin oppose the Motion. (Opp., Doc. 126.) Plaintiffs replied. (Reply, Doc. 132.) After considering the Parties' briefing and hearing oral argument, the Court concludes that Plaintiffs cannot satisfy Federal Rule of Civil Procedure 23's adequacy and superiority requirements. Therefore, the Court DENIES Plaintiffs' Motion. Additionally, the Court DENIES as moot Plaintiffs' Motion for Appointment of Class Counsel. (Class Counsel Mot., Doc. 107.)

I. BACKGROUND [1]

In July and August of 2014, Plaintiffs filed a class action, and, thereafter, a FAC, against Defendants American General, Sea Nine Associates, Inc., Innovative Private Strategies & Insurance Services, Inc., I.P.S. Private Advisors, Lalat Pattanaik, Laban Pattanaik, Kenneth A. Elliot, Peter Mordin, and six Voluntary Employees' Beneficiary Association ("VEBA") master plans. (Complaint, Doc. 1; FAC, Doc. 12.) The instant Motion for class certification followed. [2] After oral argwnent on the Motion, Plaintiffs, together with the court-appointed plan administrator, stipulated to the dismissal of the six VEBA master plans from the litigation. (Stipulation to Dismiss, Doc. 165.) The Court ordered the VEBA master plans dismissed. (Dismissal Order, Doc. 166.)

The FAC asserts that Defendants "organized, promoted, administered, and sold rights to participate in [VEBAs] that they touted as offering owners of small, closely-held businesses a valuable insurance-oriented welfare benefit with significant tax advantages." (FAC ¶ 1.) Defendants undertook this activity, according to the FAC, despite their knowledge that the VEBA plans were "noncompliant" and, as a result, "the tax advantages they promoted were illusory." (*Id.* ¶ 2.) Based on these allegations, the FAC asserts eight causes of action, including RICO violations, violations of California's Unfair Competition Law, false advertising, and fraud. (*See id.*)

II. LEGAL STANDARD

***2** "A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b)." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013). Rule 23(a) "requires a party see.king class certification to satisfy four requirements: numerosity, commonality, typicality, and adequacy of representation." *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)). Separately, under Rule 23(b)(3), a court may certify a class only if it first determines that "questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001).

As set forth in greater detail below, the dispositive issues in resolving the instant Motion are Rule 23(a)'s adequacy requirement and Rule 23(b)(3)'s superiority requirement. Determining adequacy requires a Court to consider (1) whether a conflict exists between named plaintiffs or class counsel and absent class members, and (2) whether named plaintiffs and class counsel will vigorously prosecute the action. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Inturn, determining superiority requires

consideration of the four factors enumerated in Rule 23(b)(3), specifically: (1) the class members' interest in individually controlling prosecution of the action, (2) the extent and nature of any litigation that is already pending, (3) the importance of concentrating litigation in a single forum, and (4) any anticipated difficulties attendant to proceeding as a class action. *See* Fed. R. Civ. P. 23(b)(3).

III. DISCUSSION [3]

A. Adequacy

To prevail under Rule 23(a), Plaintiffs must demonstrate that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To assess legal adequacy, the Court must decide whether "named plaintiffs ... have any conflicts of interest with other class members[.]" *Hanlon*, 150 F.3d at 1020. "Examination of potential conflicts of interest has long been an important prerequisite to class certification." *Id.* That is, "[c]lass members whose interests are antagonistic in fact to, or *even* '*potentially conflicting*' *with*, the interests of the ostensibly representative parties cannot be bound, consistent[+] with the requirements of due process." *Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656, 666 (N.D. Cal. 1976) (emphasis added).

***3** Plaintiffs contend that they are adequate representatives of the proposed class because their "interests are not antagonistic to those of proposed Class Members," and, as a result, "they share common grievances with the Class and seek the same goal of obtaining damages or restitution to make them whole." (Mem. at 14.) Moreover, Plaintiffs argue that "the proposed class representatives and their counsel have also prosecuted the case vigorously on behalf of the proposed class from the outset of the case and have the ability, expertise, and resources to continue doing so." (*Id.*)

After careful consideration of the argument and evidence submitted by the Parties, the Court concludes that there is a serious potential – and, in all likelihood, actual – conflict between Plaintiffs and certain absent class members. Therefore, the Court concludes that Plaintiffs cannot satisfy Rule 23(a)'s adequacy requirement. The conflict at issue is relatively straightforward. Specifically, by virtue of bringing this lawsuit, Plaintiffs are compelled to argue that the VEBA transactions at issue are Listed Transactions in the eyes of IRS. (*See, e.g.*, FAC ¶ 48 ("In short, none of the Master Plan Documents complied with § 419A(f)(6) and related regulations, and so Participating Employers were not entitled to deduct their contributions as represented. To the contrary, these were Listed Transactions that Participants were required to disclose to the IRS or pay a penalty.") In contrast, however, at least some of absent class members – specifically, those entities or individuals who have not yet been audited or who have been audited but found to be in compliance – may, now or in the future, wish to argue the opposite to the IRS (i.e., that their VEBA contributions were not Listed Transactions and that any deductions taken were permissible). (*See, e.g.*, Smelley Decl., Exs. AA-BB, Docs. 126-29 (examples of individuals who – after claiming VEBA-related deductions – were audited with no apparent adverse consequences).) Such entities and individuals would, potentially at least, run the risk of being collaterally estopped from pursuing this line of argument if the Court were to certify the proposed class. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication ajudgment in a properly entertained class action is binding on class members in any subsequent litigation.").

As a result of this conflict, the Court concludes that Plaintiffs cannot satisfy Rule 23(a)'s adequacy requirement.

B. Superiority

To obtain class certification under Rule 23(b)(3), Plaintiffs must demonstrate that a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." *Zinser v. Accufvc Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001). Consideration of the four factors enumerated in Rule 23(b)(3) concentrates the Court on "the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Id.* at 1190. Plaintiffs contend Rule 23(b)(3)'s superiority requirement is satisfied because "the cost of many individual actions would be prohibitively high[,]" "the class action presents an opportunity to efficiently resolve all class members' claims at the same time [,]" and "the desirability of concentrating the litigation in this forum ... particularly favors class treatment[.]" (Mem. at 24-25.)

Notwithstanding Plaintiffs' arguments, several factors cast doubt on whether the class action mechanism is superior in the instant case. First, the FAC asserts

that, following the IRS' audit review, Plaintiffs were assessed $362,904.91 in taxes, interest and penalties. (FAC ¶ 79.) Additionally, according to the FAC, Plaintiffs have contributed $914,696.74 to the VEBAs and "have lost investment opportunities by putting their money in the VEBA Program [.]" (*Id.* ¶ 81.) These figures, if proven, reflect substantial potential damages. Where damages are substantial, each potential class member possesses a strong interest in "individually controlling the prosecution ... of separate actions." Fed. R. Civ. P. 23(b)(3)(A). Therefore, this factor suggests the class action mechanism may not be superior in the instant case.

***4** Additionally, Plaintiffs' Motion concedes that "some victims of Defendants' scheme have brought individual suits against some of these Defendants[.]" (Mem. at 25.) Although Plaintiffs quickly add that most class members have not brought individual claims (*Id.*), the Court notes that Rule 23(b)(3)'s second factor disfavors use of a class action where "the court finds that several other actions already are pending and that a clear threat of multiplicity and a risk of inconsistent adjudications actually exist [.]" *Zinser*, 253 F.3d at 1191 (citing 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1780 at 568-70 (2d ed. 1986)).

Finally, "[i]f each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.' +" *Id.* at 1192. Here, several "separate issues" are likely to arise – for example, each class member's reliance on a third-party financial advisor for tax advice, the relationship between that advisor and Defendants, and the position taken by individual class members in relation to the IRS – which further indicates that use of the class action mechanism in the instant case is not superior to other methods.

Based on these considerations, the Court concludes that Plaintiffs also cannot satisfy Rule 23(b)(3)'s superiority requirement.

IV. CONCLUSION

For the reasons stated above, the Court DENIES Plaintiffs' Motion for Class Certification, without prejudice. Additionally, the Court DENIES as moot Plaintiffs' Motion for Appointment of Class Counsel. (Class Counsel Mot., Doc. 107.)

All Citations

Slip Copy, 2016 WL 2968046

Footnotes

1 A detailed factual and procedural background is set forth in the Court's Order denying Defendants' Motion to Dismiss. (MTD Order, Doc. 80.)

2 The first proposed class, entitled the "Nationwide Class," relates to Plaintiffs' causes of action for RICO violations, RICO conspiracy, fraud by concealment, and aiding and abetting. (FAC ¶ 96.) The Nationwide Class includes all entities and individuals within the United States who "at any time from January 1, 2001 to the present, joined one of Defendants' VEBA Programs and either contributed money to that Program for the purchase of one or more life insurance Policies issued by AIG or became an Insured under such a VEBA Policy issued by AIG." (*Id.*) The second proposed class, entitled the "California Class," relates to Plaintiffs' fourth and fifth causes of action for UCL violations and false advertising, respectively. (*Id.*) The California Class includes all entities and individuals residing within California between January 1, 2001 and the present that "joined one of Defendants' VEBA Programs and either contributed money to that Program for the purchase of one or more life insurance Policies issued by AIG or became an Insured under such a VEBA Policy issued by AIG." (*Id.*)

3 In their Opposition brief and at oral argument, Defendants challenged Plaintiffs' standing to pursue claims against five of the six Defendant VEBA master plans. (Opp. at 12-13.) Specifically, Defendants argued that "[i]f none of the named plaintiffs are able to establish standing as to each defendant,

'none may seek relief on behalf of himself or any other member of the class.' +" (*Id.* at 12 (citation omitted).) Because Plaintiffs "participated in only one of the six VEBAs they sue," Defendants contend they lack standing to "seek relief on behalf of [itself] or any other member of the class." (*Id.*) As Plaintiffs correctly note in Reply, however, this standing argument "is not all that crucial here" because "even if Plaintiffs did not establish liability against any of the VEBAs, Plaintiffs would still be able to represent participants in all the VEBAs against the other Defendants." (Reply at 5, n.2.) That is, even if Defendants' standing argument were accepted, the proposed class may nevertheless be viable as to all the non-VEBA Defendants. *See, e.g., Akaosugi v. Benihana Nat. Corp.*, No. C 11-01272 WHA, 2011 WL 5444265 (N.D. Cal. Nov. 9, 2011) (dismissing subsidiaries where named plaintiffs lacked standing, but clarifying that parent company remains a viable defendant). In any event, the six Defendant VEBAs have now been dismissed from this action. (Stipulation to Dismiss, Doc. 166). Therefore, Defendants' argument is moot.

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