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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

JOSE HERNANDEZ, individually)
and on behalf of all others)
similarly situated,)

Plaintiffs,)

vs.)

LEO BALAKIAN, et al.,)

Defendant.)
_____)

No. CV-F-06-1383 OWW/DLB

MEMORANDUM DECISION AND
ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND
THE COMPLAINT AND VACATE THE
SCHEDULE (Doc. 80)

This class action was commenced on October 15, 2006.
Pursuant to the First Amended Complaint (FAC) filed on April 2,
2007, Plaintiff Jose Hernandez, as class representative, has sued
defendants Leo Balakian, Anthony Balakian, and Vince Balakian,
owners of Fruit Patch, Inc. The FAC alleges that the Balakians
"have depressed [Plaintiff Hernandez's] wages as an agricultural
worker at Fruit Patch, Inc. by knowingly employing vast numbers
of illegal immigrants there for the express purpose of depressing
the market for unskilled labor"; that "[t]his is referred to as

1 'the Illegal Immigrant Hiring Scheme' or 'the Scheme''; and that
2 the Illegal Immigrant Hiring Scheme violates the Racketeer
3 Influenced and Corrupt Organizations Act (RICO). The First
4 Amended Complaint is brought on behalf of Hernandez "and all
5 other persons legally authorized to be employed in the U.S. who
6 have been employed by Fruit Patch, Inc. in the last four years
7 ... as hourly or piece rate unskilled laborers."

8 On December 17, 2007, Plaintiff filed a motion for class
9 certification, seeking to be the sole class representative for
10 several thousand legal workers at Fruit Patch, Inc. This motion
11 was set to be heard on February 11, 2008. Defendants opposed
12 this motion, primarily on the ground that Jose Hernandez will not
13 be an adequate representative of the class, in part because Mr.
14 Hernandez recently has been arrested on multiple felony charges.
15 Defendants also asserted that Mr. Hernandez cannot be an adequate
16 class representative because he was involved in an automobile
17 accident in 2005 in which he suffered an injury affecting his
18 memory which persists to the present.

19 In lieu of a reply brief, Plaintiff, on January 31, 2008,
20 filed a motion to amend for leave to amend the complaint and
21 vacate the case schedule.

22 The motion for class certification was denied from the bench
23 on February 11, 2008. Before the Court is Plaintiff's motion for
24 leave to amend and vacate the schedule.

25 Plaintiff's motion to amend seeks leave to file a Second
26 Amended Complaint within 60 days substituting a new class

1 representative and to vacate the existing schedule. Counsel for
2 Plaintiff asserts that Mr. Hernandez did not tell him of his
3 arrest and charge until after the motion for class certification
4 was filed. Counsel for Plaintiff "freely admits that his arrest
5 and felony complaint make him an inadequate class
6 representative."

7 Plaintiff cites *National Federation of the Blind v. Target*
8 *Corp.*, 2007 U.S. 2846462 (N.D.Cal.2007). In a discussion of the
9 typicality requirement of Rule 23(a)(3), Federal Rules of Civil
10 Procedure, the District Court stated:

11 [T]he court is not convinced that Sexton has
12 demonstrated an injury with the requisite
13 nexus to the Target stores for the nationwide
14 class. However, the court is satisfied that
15 some of the putative class members would
16 present the same type of legal and remedial
17 theory as the unnamed class members. As long
18 as the proposed class satisfies the
19 requirements of Rule 23, the court may
20 certify the class conditioned upon the
21 substitution of another named plaintiff. See
22 *Kremens v. Bartley*, 431 U.S. 119, 135 ...
(1977) (where named plaintiffs' claims were
determined to be moot, ordering substitution
of class representatives); *Gibson v. Local*
40, 543 F.2d 1259, 1263 (9th Cir.1976) ('In
any event, failure of proof as to the named
plaintiffs would not bar maintenance of the
class action or entry of judgment awarding
relief to the members of the class.'). Thus,
the court will grant plaintiffs' leave to
substitute another class representative for
the nationwide class.

23 2007 WL 2846462 at *14. Plaintiff also cites *Rice v. Lender*
24 *Services Direct, Inc.*, 2007 WL 2287873 (D.Ariz.2007) (motion to
25 amend to name new class representatives granted because of
26 serious illness of class representative's husband).

1 Defendants argue that the issue is whether "Plaintiff's
2 counsel should be given time to scour the Fresno-area for someone
3 willing to serve as class representative for Plaintiff's
4 counsel's copy-cat lawsuit."¹ Defendants cite *Bodner v. Oreck*
5 *Direct, LLC*, 2007 WL 12223777 (N.D.Cal.2007):

6 In light of plaintiff's undeniable and
7 overwhelming ignorance regarding the nature
8 of this action, the facts alleged, and the
9 theories of relief against defendant, the
10 court cannot conclude that he has met the
11 threshold typicality or adequacy requirement
12 of Rule 23(a). It is clear from the record
13 that plaintiff's counsel, and not plaintiff,
14 is the driving force behind this action.
15 Such a 'cart before the horse' approach to
16 litigation is not the proper mechanism for
17 the vindication of legal rights. See *Meachum*
18 *v. Outdoor World Corp.*, 171 Misc.2d 354, 654
19 N.Y.S.2d 240, 369 (1996) ('Solicitation of
20 clients for the commencement or continuation
21 of a class action is improper, sufficient to
22 warrant denial of class certification.')
23 Furthermore, the Westrup Klick firm has had
24 trouble regarding its choice of plaintiffs in
25 the past. See *Apple Computer, Inc. v.*
26 *Superior Court*, 126 Cal.App.4th 1253 ...
(2005) (disqualifying the Westrup Klick firm
from a class action case where it was
established that, 'from 2003 to 2005, Westrup
Klick and [another firm] had jointly filed 10
class actions under [California's Unfair
Competition Law] in which an attorney from
Westrup Klick or a relative of one of the
attorneys was the named plaintiff'). The
latest filing is just one more example of
plaintiff's counsel's improper approach to
consumer litigation.

That plaintiff's counsel constructed this

¹Defendants' opposition to the motion for leave to amend was filed on February 8, 2008, just before the hearing on the motion for class certification. Parts of the opposition argue against certification of the class, arguments now mooted by the oral order denying the class certification motion.

1 lawsuit before it had a plaintiff cannot be
2 denied. This fact is borne out not only by
3 plaintiff's own admissions, but by
4 plaintiff's counsel's previous abortive
5 attempt to bring a seemingly identical
6 lawsuit in another district. Indeed, counsel
7 himself admitted at the hearing that he or
8 his firm had the research performed on the
9 product at issue and had a theory about the
10 product's deficiencies. Then, armed with that
11 information they went in search of a
12 plaintiff, never mind the lack of a fitting
13 plaintiff or the lack of ethical scruples.
14 The instant action is nothing more than
15 Westrup Klick bringing its show to the
16 Northern District and continuing its practice
17 of selecting stand-in plaintiffs, even ones
18 who are inappropriate. To grant class
19 certification in such circumstances would be
20 to place this court's imprimatur on
21 litigation practices which it finds abhorrent
22 and inconsistent with the standards of
23 federal class action suits.

13 In short, the conduct in this action does not
14 look good, does not sound good, and does not
15 smell good. In fact, it reeks. The court
16 will not participate in this scheme by
17 certifying a class.

16 Plaintiff replies that *Bodner* is not controlling because it
17 involved denial of class certification, not the substitution of
18 the class representative. Plaintiff contends that the arrest of
19 the named plaintiff who is unable to post bond precludes him for
20 properly pursuing this action. It is asserted that denial of the
21 motion for leave to amend will effectively end this action and
22 that nothing in the record supports that outcome.

23 Rule 15(a), Federal Rules of Civil Procedure, requires that
24 leave to amend should be freely granted when justice so requires.
25 Although it is arguable that Jose Hernandez would not have been
26 an adequate representative notwithstanding his arrest, that issue

1 is no longer before the Court. The concern expressed in *Bodner*
2 is one that can be addressed if and when a motion for class
3 certification is filed, assuming a new class representative can
4 be located.

5 Plaintiff has already had 30 days to locate a new class
6 representative. Plaintiff shall have an additional thirty (30)
7 days or until April 17, 2008 to amend to substitute a suitable
8 class representative. The motion for leave to amend is GRANTED
9 on that condition. If the amendment is made, a scheduling
10 conference shall be held on May 2, 2008 at 8:15 a.m. If no
11 amendment is made, the action shall be dismissed without
12 prejudice.

13 IT IS SO ORDERED.

14 Dated: March 18, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE