

QUAN-EN YANG, <i>et al.</i> ,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
G & C GULF, INC., <i>et al.</i> ,	*	MONTGOMERY COUNTY
Defendants.	*	Case No. 403885V
* * * * *	*	* * * * *

**DEFENDANT CLASS REPRESENTATIVE'S OPPOSITION TO PLAINTIFFS' MOTION TO APPROVE ADMINISTRATIVE ORDER NO. 3<sup>1</sup>**

On his own behalf and on behalf of the Defendant Class, Defendant Bruce Patner t/a Patner Properties ("Mr. Patner") opposes Plaintiffs' Motion to Approve Administrative Order No. 3 (Docket No. 401), for the following reasons.

1. Plaintiffs' Motion inaccurately characterizes the present status of this litigation and is premature. Before issuing notice to the hundreds of absent members of the Defendant Class, the Court should resolve (i) who will serve as the Named Representatives for the Plaintiff and Defendant Classes (Pelz and Pelz-Butler have settled their claims and are no longer proper representatives of Plaintiffs; without them, there is no party with a claim against Mr. Patner), and (ii) whether there are any viable claims remaining against the members of the Defendant Settlement Class, in view of the statute of limitations issues afflicting the remaining claims against them. To issue notice before

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<sup>1</sup> Nothing in this Opposition waives any of Defendant's prior Motions, including without limitation, his Opposition to the Certification of the Plaintiff Class, his Opposition to the Certification of the Defendant Litigation Class, and his prior Motions to Dismiss, all of which are incorporated herein by reference.

these issues are resolved will waste resources and cause needless confusion. The Court should deny the Motion to Approve Administrative Order No. 3.

2. Pursuant to Rule 2-303(d), Mr. Patner adopts and incorporates here by reference the Motion to Withdraw as Counsel for Defendant Litigation Class and as Representative of Defendant Litigation Class (Docket No. 396) that he and Kramon & Graham, P.A., filed on February 16, 2018.

3. For the reasons stated in the Motion to Withdraw, now is the appropriate juncture for the Court to permit Mr. Patner to withdraw as class representative and to permit Kramon & Graham, P.A., to withdraw as counsel for the Defendant Litigation Class. Mr. Patner has settled claims related to the majority of tows associated with his properties and, as the Court is aware, moved for and obtained the Court's approval of that settlement. As a result, he is no longer an adequate class representative for the members of the Defendant Litigation Class who rejected that settlement. Indeed, Plaintiffs quote from Mr. Patner's Motion for Approval of the Settlement ("Motion to Approve") in their cross-motion for summary judgment (Docket No. 412 at p. 18, n.9), and attempt to construe statements from the Motion to Approve as concessions binding the entire Defendant Litigation Class. As a settling class member, Mr. Patner's interests are dissimilar to the interests of the class members who opted out of the settlement and who constitute a significant portion of the Defendant Litigation Class. Those members have taken proactive steps to reject the settlement that Mr. Patner sponsored and, instead, have

decided to continue with the litigation. Mr. Patner can no longer fairly or adequately represent their interests. *See* Rule 2-231(a)(4).

4. Moreover, as a result of the settlement this Court approved on January 16, 2018 (Docket Nos. 368-369, entering judgment), there is now no named Plaintiff with a live claim against Mr. Patner. If no named Plaintiff has a claim against the named Defendant Class Representative, the Plaintiff Class lacks standing and cannot maintain a claim against that Defendant. *See, e.g., In re Franklin Mut. Funds Fee Litig.*, 388 F. Supp. 2d 451, 461 (D.N.J. 2005) ("[I]n order to establish standing in the class action context, for each named defendant, at least one named plaintiff must be able to allege injury traceable to that defendant."); *Godfredson v. JBC Legal Group, P.C.*, 387 F.Supp.2d 543, 552 (E.D.N.C. 2005) ("This court does not, at present, rule upon plaintiffs' motion for certification as a class action, because that motion is not yet ripe for decision. However, because plaintiffs have failed in alleging the instant RICO claim to present a party with standing to bring the claim, or even to establish the requisites of a case or controversy as required to invoke the jurisdiction of this court, this court finds that it is appropriate to dismiss Count IV of the complaint, alleging a RICO violation, for failure to state a claim"); *Henry v. Circus Casinos, Inc.*, 223 F.R.D. 541 (D. Nev. 2004) ("what is required is that for every named defendant there be at least one named plaintiff who can assert a claim directly against that defendant"); *In re MicroStrategy, Inc. Securities Litigation*, 115 F. Supp. 2d 620, 664 (E.D. Va. 2000) ("In addition, insofar as Plaintiff Schwartz lacks standing to bring a claim against Ingari personally, and she is the

sole claimant and class representative on the Section 20A count, Count III of the Complaint must be dismissed as to Defendant Ingari").

5. Kramon & Graham, P.A., also should be permitted to withdraw as class counsel for the Defendant Litigation Class. Not only does the firm's client, Mr. Patner, have divergent interests from the class members who opted out of the recent settlement in favor of continuing with the litigation, but it is not fair to require Kramon & Graham to continue to shoulder the burden of litigating this case on behalf of absent members who rejected that settlement. Yet, the Administrative Order that Plaintiffs propose does exactly that, identifying Kramon & Graham as the sole Defendant Class Counsel and directing recipients to contact Kramon & Graham with questions concerning the ongoing litigation. Given the possibility that Kramon & Graham will be replaced as class counsel, there is no good reason to sow confusion now with an order and notice that directs the entire class to contact Kramon & Graham with questions, *particularly* when, as set forth below, Plaintiffs' counsel intends to add a new Defendant Litigation Class Representative, who is separately represented.

6. At the status conference held before this Court on February 2, 2018, counsel for the Plaintiff Litigation Class advised the Court that Plaintiffs intended to file a Fifth Amended Complaint, and would name a new Defendant Litigation Class Representative at that time. Plaintiffs' counsel stated that the new Defendant Litigation Class Representative would not object to representing the Defendant Litigation Class. Under these circumstances, there is *no* reason to force Mr. Patner and his attorneys to

represent the Defendant Litigation Class, particularly where doing so will cause Mr. Patner and his counsel to bear the extensive costs associated with that representation.

7. Plaintiffs' characterization of the fee award to Kramon & Graham is inaccurate and misleading. *See* Motion to Approve Administrative Order No. 3 at 5, n.2. As stated in Kramon & Graham's December 28, 2017 Application for an Award of Fees and Costs (Docket No. 340) at 7-8, filed in connection with Mr. Patner's December 28, 2017 Motion to Approve the Settlement,<sup>2</sup> the \$400,000 in fees that the firm requested already represented a discount of 20 percent on the more than \$500,000 in services the firm rendered in the case up through December 18, 2017. Further, although the settlement provides for an assessment on Defendant Settlement Class Members to pay for that award, it is now clear that the entirety of that discounted award will **not** be collected. Significant opt-outs have been permitted since the approval of the Settlement, resulting in a diminution of the amount of fees that will be collected from Defendant Settlement Class members. Since there is no mechanism in place to reassess the Defendant Settlement Class, both Mr. Patner and Defendant Class Counsel's collected fees will be proportionally reduced, even though the assessed fees remain the same. As of this date Kramon & Graham has collected less than 64% of the market value of its fees.

8. Moreover, there is not currently any mechanism for Kramon & Graham to recoup any fees billed after the time of the Court's January 16, 2018 Judgment approving the settlement. (Docket Nos. 368-369). From December 19, 2017 through January 31,

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<sup>2</sup> This Motion apparently was not docketed.

2018, alone, Kramon & Graham has rendered additional services with a value of \$76,448 and incurred additional expenses in the amount of \$540.38. Neither Mr. Patner nor Kramon & Graham should be forced to fund the defense of this litigation on behalf of class members who are not similarly situated and who have divergent interests to Mr. Patner's.

9. The order of operations Plaintiffs now propose is exactly backwards and will result in substantial confusion for the absent members of the Defendant Class. In the interest of judicial economy and fairness to the parties, if Plaintiffs intend to file a Fifth Amended Complaint, and name a new Defendant Litigation Class Representative (and presumably a new Named Plaintiff with a live claim against that Defendant), as their counsel said they would do a month ago, they should do so now.<sup>3</sup> Next, the Court should resolve the pending motion for partial summary judgement that raises the statute of limitations arguments raised by Defendants. This motion, if granted, will end the case for the more than 400 members of the Defendant Settlement Class. The Court should then address the Motion to Withdraw filed by Mr. Patner and Kramon & Graham. Only after these issues are resolved can the Court issue an Administrative Order and Notice that contain accurate information for the absent members of the Defendant Litigation Class.

10. The prudent and common sense course is to defer consideration of Plaintiffs' Motion until after Plaintiffs have filed their Fifth Amended Complaint, the

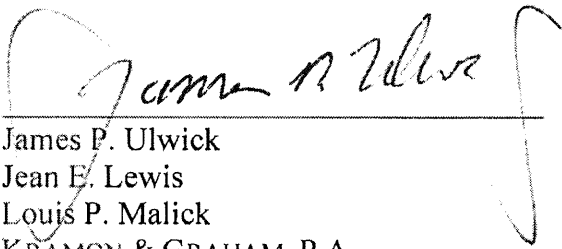
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<sup>3</sup> If Plaintiffs choose not to file a Fifth Amended Complaint, their entire case will be subject to dismissal for the reasons stated in paragraph 4 above, and all of these issues will be moot.

Court has ruled on Defendants' motion for partial summary judgment, and the Court has ruled on the Motion to Withdraw.

For all of these reasons, the Court should deny or defer the Plaintiffs' motion to issue their proposed Administrative Order No. 3.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 1, 2018, copies of the foregoing document were sent via first class mail to the following:

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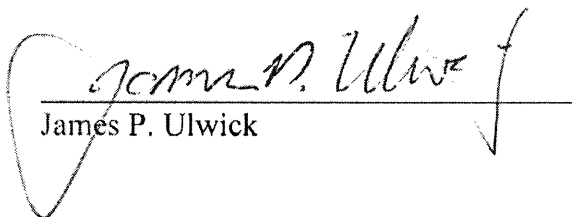


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