**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 04/22/2016 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2015-00186855-CU-OE-GDS** CASE INIT.DATE: 11/17/2015
CASE TITLE: **Richard Smigelski in his representative capacity vs. Pennymac Financial Services Inc**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Reconsideration - Civil Law and Motion

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APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Motion for Reconsideration Re: Corrective Action) taken under submission on 4/19/2016

TENTATIVE RULING

Defendants Private National Mortgage Acceptance Company, LLC, Penny Mac Financial Services, and PennyMac Mortgage Investment Trust's ("Defendants") motion for reconsideration "re: Plaintiff's Motion for Corrective Action" is denied.

In the instant action, Plaintiff Richard Smigelski initially asserted a single representative cause of action under the Private Attorney General Act ("PAGA"), Labor Code § 2699 on behalf of the State and other aggrieved employees for alleged Labor Code violations. Plaintiff did not assert any individual claims and only sought an award of penalties pursuant to PAGA. Plaintiff filed a motion for corrective action seeking to have the Court find that any settlement between Defendants and its current or former employees which purports to release PAGA claims are invalid. It also sought an order that Defendants be required to submit any future proposed settlement agreements purporting to release PAGA claims identified in the complaint for Court approval, requiring issuance of a "corrective notice" to correct alleged misleading information in communications sent to employees, and expedited discovery with respect to any settlements with employees. The Court ultimately granted the motion finding that any settlement agreement between Defendants and any current or former employee that release the PAGA claims in the instant lawsuit is invalid. The Court also ordered that a curative notice shall be sent to all employees that received Defendants' communications, notifying them that any release is invalid, and correcting the communications. The parties were directed to meet and confer on the content of the notice. The Court also required Defendants to submit for the Court's approval any future proposed settlement of the PAGA claims identified in Plaintiff's complaint. The Court denied Plaintiff's request for expedited discovery.

On March 10, 2016, Plaintiff filed a first amended complaint adding individual and putative class claims for unpaid overtime under Labor Code §§ 510 and 1194, penalties based on the failure to provide accurate wage statements under Labor Code § 226 and waiting time penalties under Labor Code § 203.

Defendants seek reconsideration on the basis that the new claims in the FAC bring the case within the broad, free speech protections afforded to communication with potential class members and that the Court should either vacate the previous ruling or modify the previous ruling to the extent it requires Defendants to issue an unnecessary corrective notice or seek Court approval of future proposed settlements.

When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. (CCP § 1008.)

Here, the Court finds that Plaintiff's act of filing the FAC containing new claims is not a new or different fact or circumstance which would allow the Court to reconsider its previous order granting Plaintiff's motion. As set forth in the Court's ruling on Defendants' motion for reconsideration of the denial of the petition to compel arbitration, the FAC, filed in direct response to the Court's ruling on Defendants' petition to compel arbitration has no bearing on the Court's ruling. That is, while the claims asserted in this action have expanded, the Court concluded that the communications which Defendants made to employees, in which they indicated, among other things, that the employees would not receive anything from the instant lawsuit (which at the time was a only a PAGA lawsuit), failed to provide a copy of the lawsuit or any contact information of Plaintiff's counsel, was at a minimum misleading. The Court therefore ordered that a a curative notice be sent to the recipients of the communications in addition to invalidating any releases premised on the communications. The FAC does not, however, change the nature of the communications in any manner whatsoever. That is, the Court concluded that the communications inaccurately described the law because Defendants stated that "under current law, 75% of any penalties must be paid to the State of California. Any remaining amount...would be paid only to the former employee and his attorney." As the Court stated in its ruling, "This is an incorrect statement of the law. As the California Supreme Court has made clear, in PAGA suits, "a portion of the penalty goes not only to the citizen bringing the suit **but to all employees affected by the Labor Code violation**." (*Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, 382 [emphasis added].) (March 11, 2016 Order). The Court also made clear that any settlements of PAGA claims that had resulted from these communications were invalid as such settlements were subject to Court review. (Labor Code § 2699(l).) The FAC also does not change the fact that any settlements of PAGA claims absent Court review were invalid. While the FAC now also adds non-PAGA individual and class claims, it does not change the fact that the communications were misleading as they relate to the PAGA claims and the settlements of PAGA claims were invalid. As with its other motion for reconsideration, Defendants again seem to argue that the Court's original analysis was incorrect. But a disagreement with the Court's analysis is not a new or different fact or circumstance. Absent such new or different facts or circumstances, the Court lacks jurisdiction to consider this motion. (*Gilberd v. AC Transit* (1995) 32 Cal. App.4th 1494, 1500.) The motion is denied on this basis alone.

In any event, even if the FAC were considered a new or different fact or circumstance, the Court would affirm its original order.

Defendants mainly argue that free speech protections under the federal and state constitutions apply to communications with putative class members. The Court already recognized such a right in granting Plaintiff's motion, and specifically recognized that there is clearly a right to communicate with, for example, putative class members and to make settlement offers to putative class members. But, as the Court made clear, while a defendant has such a right, communications must be made in a

non-misleading way and courts may limit communications that omit critical information about the lawsuit or which are misleading or coercive. (E.g., *Slavkov v. Fast Water Heater Partners* (N.D.Cal. 2015) 2015 U.S.Dist.LEXIS 149013 at *6-7.) While it is true that the FAC has now included class claims, the Court's original ruling specifically discussed class action cases in its ruling. Indeed, the Court stated that "[i]n the class action context, the United States Supreme Court has held that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties...such a weighing---identifying the potential abuses being addressed-should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances." (*Gulf Oil Co. v. Bernard* (1981) 452 U.S. 89, 101-102.)." (March 11, 2016 Order)

The fact that the FAC now includes class actions claims simply reinforces the Court's original ruling. Nothing about the FAC indicates that the Court's original ruling somehow failed to take into consideration Defendants' free speech rights or violated such rights, or constitutes a prior restraint. As stated before, "the Court is not enjoining Defendants from engaging in speech with employees but, rather, requiring that a curative notice be sent to all recipients of Defendants' communications. This is appropriate under the circumstances of the misleading communications at issue. (*Slavkov, supra,* 2015 U.S.Dist.LEXIS 149013 at *22.) Further, the Court's requirement that the parties meet and confer on the appropriate corrective notice and to bring an appropriate motion in the event the parties cannot agree is not impermissible, government compelled speech. Rather, it is carefully drawn condition limiting speech as little as possible consistent with the rights of the parties. (*Gulf Oil Co., supra,* 452 U.S. 89, 101-102.) To the extent that Defendants contend that they are not allowed to decide the content of the corrective notice, the Court disagrees. The parties were ordered to meet and confer on the notice and Defendants are free in that process to propose a notice which incorporates the speech they want, for example, that they contend that any PAGA relief would only go to Plaintiff (as opposed to having previously affirmatively stating without any qualifications that any PAGA relief only goes to Plaintiff). To the extent the parties cannot agree, the Court's potential approval of a corrective notice is simply a carefully drawn condition to ensure that any communications regarding the PAGA claim to employees is not misleading. Defendants' citation to *Gerawan Farming v. Lyons, Inc*. (2000) 24 Cal.4th 468, 513-514 to argue that it cannot be ordered to issue a court approved corrective notice because such speech is compelled government speech which is presumptively unconstitutional is misplaced. That case does not involve the Court's authority to control communications in the context of a class/respresentative action.

Defendants also argue that a corrective notice is no longer necessary because the Court has ruled that any settlements that resulted from such communications are invalid. But Defendants do not show that any affected employee is aware of such fact. Moreover, as pointed out by the Court, the releases precluded the employees from participating in this action in any manner, even as a witness. There is no showing that these employees are aware that the releases have been invalidated and that they are able to participate in the action.

Defendants appear to argue that the original order violates their free speech rights because the FAC now includes class claims and it would not be able to obtain settlements/releases regarding these claims without prior approval. This is incorrect. The Court's order only addresses the communications that were previously made with respect to the PAGA claim and settlements of PAGA claims. The order **does not** require prior approval of settlements of any non-PAGA claim. Nor does the order prohibit Defendants from contacting any employees.

In sum the motion for reconsideration is denied on the basis that Defendants failed to establish any new or different facts or circumstances pursuant to CCP § 1008 based on the filing of the FAC and in any event, even if the FAC was such a fact or circumstances, the Court would simply affirm its original ruling granting Plaintiff's motion. Again, however, that ruling does not require Defendants to obtain prior

approval of any settlement/release of any non-PAGA claim nor does it preclude them from contacting employees.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

COURT RULING

The matter was argued and submitted.

Having taken the matter under submission on 4/19/2016, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirmed the tentative ruling.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: April 22, 2016

E. Brown, Deputy Clerk _____s/ E. Brown_____

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