

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

MINUTE ORDER

DATE: 09/27/2019

TIME: 02:00:00 PM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: E. Brown

REPORTER/ERM: Contreras, Hector #14051

BAILIFF/COURT ATTENDANT: R. Mays, Alvi, N.

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 - Other - Civil Law and Motion

APPEARANCES

E. Sean McLoughlin, counsel present for defendant

Warren J. Higgins, counsel present for defendant

Michael Curtis, counsel present for plaintiff

Nature of Proceeding: Motion for an Order Requiring Defendants to Send Corrective Notice

TENTATIVE RULING

Effective September 23, 2019, official court reporters will not be available in Departments 53 and 54, with exceptions listed in the Court's Policy Regarding Availability and Unavailability of Official Court Reporters. Additional information regarding this policy can be found on the Court's website at www.saccourt.ca.gov.

Plaintiff Richard Smigelski's ("Plaintiff") motion for an order requiring Defendants to send a corrective notice pursuant to this Court's March 11, 2016, and April 22, 2016 Orders is ruled upon as follows.

Factual and Procedural Background

Plaintiff filed this instant action on November 17, 2015. Originally, Plaintiff only 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 by defendants Private National Mortgage Acceptance Company, LLC, PennyMac Financial Services, and PennyMac Mortgage Investment Trust's (collectively, "Defendants").

On February 3 and 4, 2016, Plaintiff learned Defendants were sending individual letters to former aggrieved employees requesting they sign a general release in exchange for a modest sum. Plaintiff contended Defendants misstated the law and facts in those communications and moved the Court for corrective action arising from the misleading communications.

On March 3, 2016, the Court issued its submitted matter ruling on Plaintiff's motion for corrective action. Therein, the Court ordered in relevant part:

DATE: 09/27/2019

MINUTE ORDER

Page 1

DEPT: 53

Calendar No.

(1) "Given the misleading nature of [Defendants'] communications, the court may properly order that a curative notice be sent to the recipients of the communications in addition to invalidating any release premised on the communications." (ROA 39, p. 9.)

(2) The "motion is granted to the extent that the Court finds that any settlement agreement between Defendants and any current and former employee that releases PAGA claims in the instant lawsuit is invalid." (ROA 39, pp. 10-11.)

(3) In addition, a curative notice shall be sent to all employees that received Defendants' communications, notifying them that any release is invalid, and correcting the communications consistent [with the Court's order]. The parties are directed to meet and confer over the next 60 days. At the end of this period, and to the extent the parties cannot reach agreement on the notice, the parties may schedule an ex parte hearing with the Court to submit their competing proposed notices to the Court for approval. (ROA 39, p. 11.)

(4) Further, the motion to require Defendants to submit for the Court's approval any future proposed settlement of PAGA claims is granted. (ROA 39, p. 11.)

Defendants moved for reconsideration of this Order, which was denied on April 22, 2016. (ROA 73.)

On March 10, 2016, Plaintiff filed a First Amended Complaint ("FAC") 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.

On April 29, 2016, Defendants appealed this Court's order denying Defendants' motion to compel arbitration. (ROA 74.) The matter was stayed for approximately three years pending the appeal.

Defendants' appeal was *denied*, as was their motion for rehearing and petition for certiorari. (Baker Decl. ¶ 3.)

On May 13, 2019, the Court of Appeals issued its remittitur to this Court, declaring its decision final and awarding Plaintiff his costs on appeal. (ROA 123.) Plaintiff filed a Notice of Termination of the stay on May 20, 2019. (ROA 124.)

After the issuance of remittitur, Plaintiff reached out to Defendants regarding the Court-required corrective notice. The parties sought to agree upon, as ordered by the Court, a proposed corrective notice to be issued by Defendants. Since May of 2019, the parties have exchanged six drafts of the proposed notice and engaged in meet and confer discussions, but have been unable to reach an agreement regarding the substance of the notice.

Pursuant to the Court's July 25, 2019, ex parte Order (ROA 143), Plaintiff now brings this duly noticed motion regarding the proper corrective notice.

Plaintiff submits the competing proposed corrective notices to the Court to resolve the stalemate.

Plaintiff also asks that the notice be issued no later than October 4, 2019, and that Defendants be required to file a declaration under oath certifying that the notice accepted by the Court was sent to all current and former employees from whom Defendants have sought settlements or releases of claims alleged in this lawsuit.

Discussion

The Court has reviewed the prior Minute Orders and the arguments raised by the parties in the moving

and opposing papers and finds that it cannot accept either proposed corrective notice in total. Both proposed corrective notices go beyond what is required by the Court's Minute Orders. Both Plaintiff and Defendants have included language that is neither required nor warranted.

Rather than discussing each of the parties' respective arguments concerning sentences, phrases, or attachments which they deem objectionable, and in the interest of judicial efficiency, the Court elects to incorporate pieces from both parties' proposed notices while simultaneously removing some proposed language and attachments that the Court deems unnecessary and unwarranted. The Court is including the minimal amount that is required to correct the prior communication issued by Defendants and notify employees that the release is invalid.

Accordingly, the Court finds the following proposed corrective notice shall be issued by Defendants to all current and former employees from whom Defendants have sought settlements or releases of claims alleged in this lawsuit no later than October 25, 2019:

In 2016, PennyMac presented you with a release that included claims alleged under California's Private Attorney General Act (PAGA) in a wage-hour lawsuit entitled Richard Smigelski vs. PennyMac Financial Services, Inc., et al., Sacramento Superior Court Case No. 34-2015-00186855 ("the Smigelski lawsuit"). The release was accompanied by a written communication explaining that if you signed the release, you would be paid money in exchange for doing so. You may have signed a release.

This release and the accompanying written communication were challenged by the Plaintiff in this lawsuit.

On March 3, 2016, the Court found that any settlement agreement between PennyMac and any current or former employee that releases the PAGA claims in the Smigelski lawsuit is invalid. Accordingly, this notice is to advise you that any release you may have signed purporting to release PAGA claims in the Smigelski lawsuit is invalid. That means you have not waived your ability to bring legal claims against PennyMac if you signed a release. Further, this notice is to advise you that you have the right to participate in the Smigelski lawsuit, as a witness or otherwise, even if you accepted a settlement payment and signed a release.

The written communication also 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." The Court found this was an incorrect statement of the law. Under the PAGA, 75% of any penalties are paid to the State of California, and the remaining 25% of the penalties 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.)

Since the Court's March 3, 2016, ruling, the Smigelski lawsuit has been expanded beyond the original PAGA claim to include class action claims that, if successful, could entitle you to share in any class wide recovery. A copy of the operative complaint in the Smigelski lawsuit is enclosed.

If you have any questions concerning these matters, you can contact Plaintiff's counsel, Chris Baker, at:

Baker Curtis & Schwartz, P.C.
1 California St., Suite 1250
San Francisco, CA 94111
cbaker@bakerlp.com <<mailto:cbaker@bakerlp.com>>
415.433.1064

Nothing in the Court's current orders prohibits PennyMac from contacting current or former employees to

negotiate settlements of individual wage-hour claims.

Defendants shall file a declaration under oath certifying the notice required by the Court was sent to all current and former employees from whom Defendants have sought settlements or releases of claims alleged in this lawsuit no later than November 7, 2019.

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

COURT RULING

The matter was argued and submitted.

The Court takes this matter under submission.