FILED
ENDORSED
MAR 11 2016
By E. BROWN
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

RICHARD SMIGELSKI, in his representative capacity

Plaintiff,

vs.

PENNYMAC FINANCIAL SERVICES, INC.; PENNYMAC MORTGAGE INVESTMENT TRUST; PRIVATE NATIONAL MORTGAGE ACCEPTANCE CO. (aka "PENNYMAC"), and Does 1-50, inclusive,

Defendants.

Case No. 34-2015-00186855

~~[PROPOSED]~~ **ORDER REGARDING PLAINTIFF RICHARD SMIGELSKI'S MOTION FOR CORRECTIVE ACTION ARISING FROM MISLEADING COMMUNICATIONS WITH AGGRIEVED EMPLOYEES**

Dept: 53
Judge: Hon. David L. Brown

BY FA

On February 29, 2016, at 2:00 p.m. in Department 53 of this Court, the Court heard and took under submission Plaintiff Richard Smigelski's Motion for Corrective Action Arising from Misleading Communications with Aggrieved Employees. Having read the motion and supporting documentation, and having considered arguments submitted orally by counsel and the motion having been submitted for a decision, IT IS HEREBY ORDERED THAT:

The Court grants Plaintiff's motion in part, and denies it in part, as stated in the attached Minute Order.

IT IS SO ORDERED.

Dated: MAR 11 2016

By: DAVID I. BROWN
Hon. David L. Brown
Judge Superior Court of the County of Sacramento

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

Having taken the matter under submission on 2/29/2016, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court vacates the Tentative Ruling and now rules as follows:

Plaintiff Richard Smigelski's motion "for corrective action arising from misleading communications with aggrieved employees" is ruled upon as follows.

In the instant action, Plaintiff Richard Smigelski asserts 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 ("Defendants"). Plaintiff does not assert any individual claims and only seeks an award of penalties pursuant to PAGA.

By way of this motion, Plaintiff seeks 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 seeks 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.

Plaintiff argues that Defendants have sent misleading communications/releases to employees requesting they sign a general release in exchange for a modest sum. He argues that Defendants have misstated the law with respect to PAGA because they indicate that if Plaintiff were to succeed on the PAGA claim, the employees would get nothing and that everything would go to the State and Plaintiff. The release indicates that it is intended to resolve all employment claims including those allegedly made on the employees' behalf by Plaintiff in this action.

Plaintiff seeks to have the Court issue the requested orders pursuant to its inherent powers of "fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation." (*Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 758.) "Trial courts unquestionably have authority to impose appropriate sanctions or other remedial measures upon determination that the litigation conduct of a party or its attorneys falls short of that required by the law and applicable rules of ethics. (Code Civ. Proc., §§ 128.5, 1211, 1212; see *Bauguess v. Paine* (1978) 22 Cal.3d 626, 637 [150 Cal. Rptr. 461, 586 P.2d 942]" *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal. App. 4th 947, 958. The U.S. Supreme Court has affirmed that courts possess certain inherent powers that "necessarily result...from the nature of their institution, powers that cannot be dispensed

with...because they are necessary to the exercise of all others." *United States v. Hudson & Goodwin*, (1812) 11 U.S. 32, 34. These powers are "not confined by or dependent on statute" (*Walker v. Superior Court*, (1991) 53 Cal. 3d 257, 267) and include the power to "fashion[] procedures and remedies as necessary to protect litigants' rights." *Slesinger*, 155 Cal. App. 4th at 762. California courts were created by the California Constitution and are deemed to have inherent powers "not confined by or dependent on statute (CAL. CONST. art. VI, § 1.) The California Supreme Court has recognized two types of inherent powers: 1) "courts' equitable power derived from the historic power of equity courts," and 2) "supervisory or administrative powers which all courts possess to enable them to carry out their duties." *Peat, Marwick, Mitchell & Co. v. Superior Court*, (1988) 200 Cal. App. 3d 272, 287(internal quotations omitted). The latter powers, in particular, enable a court to "control litigation before it, to prevent abuse of its process, and to create a remedy for a wrong even in the absence of specific statutory authority." (*Western Steel & Ship Repair, Inc. v. RMI, Inc.*, (1986) 176 Cal. App. 3d 1108, 1116-1117.)

The Court rejects Defendants' arguments that it lacks the power to grant the requested relief. Defendants' first argue that Plaintiff is actually seeking a preliminary injunction precluding them from communicating with employees and related declaratory relief rescinding any releases entered into by Defendants and any employee. They argue that Plaintiff cannot meet the standards set forth in CCP §§ 526 and 527. But in reality Plaintiff does not seek an injunction under CCP §§ 526/527, but rather corrective action premised on "improper behavior with respect to the litigation process itself" given Defendants' communications with employees about the instant litigation. (*San Francisco Unified School District v. First Student, Inc.* (2013) 213 Cal.App.4th 1212, 1226 [addressing a party's communications with employees in a qui tam action].) Such relief is properly construed as an exercise of the court's inherent powers to control the proceedings before it and the proper focus is not whether Plaintiff is likely to succeed on the merits and a balancing of harms but rather whether the relief is a proper exercise of the court's inherent authority based on the evidence before it. (*Id.* at 1226-1227.) As seen from various authorities in the analogous class action context, while there is no dispute that Defendants were able to contact the employees and attempt to seek settlements, courts have granted motions seeking corrective action in the form of sending curative notices and invalidating settlement releases obtained from putative class members premised on misleading communications. (E.g., *Slavkov v. Fast Water Heater Partners* (N.D.Cal. 2015) 2015 U.S.Dist.LEXIS 149013.) As recited by the District Court, "Rule 23(d) gives district courts the power to regulate the notice and opt-out processes and to impose limitations when a party engages in behavior that threatens the fairness of the litigation." *Id.* at *5-8 ["Courts in this district have limited communications, as well as invalidated agreements that resulted from those communications, when they omitted critical information or were otherwise misleading or coercive."]

Further, while Defendants are correct that communications, for example, to putative class members is protected free speech, Plaintiff is not here seeking to *enjoin* Defendants from communicating with employees. To be clear, Plaintiff seeks corrective action in the form of a curative notice and rescission of releases obtained in connection with the communications to date. While a defendant may make offers of settlement to putative class members, for example, they 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.) In 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.)

Here, the Court is not enjoining Defendants from engaging in speech with employees but, rather, as

explained more fully below, is 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.) Defendants are also correct that their speech is protected by Civil Code § 47(b), but Plaintiff is not seeking to hold them *liable* for anything they did in connection with the subject communications and no authority is presented which would allow § 47 to preclude the Court from issuing the subject order for corrective action based upon the misleading communications herein.

Here, the Court agrees with Plaintiff that Defendants' communications to employees fails to accurately describe the law. In the communications, Defendants state 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." (Baker Decl. Exh. 1.) This is, as the Court perceives it, 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].) "Under the [PAGA] legislation, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations...Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving 25 percent for the 'aggrieved employees.'" (*Id.* at 380.) Moreover, seen from the Court's ruling on the petition to compel arbitration, underpaid wages are a civil penalty under Labor Code § 558 (which may be recovered in a PAGA action) "with the underpaid wages going entirely to the affected employee or employees as an express exception to the general rule that civil penalties recovered in a PAGA action are distributed 75 percent to the [LWDA] "and 25 percent to the aggrieved employees" (Labor Code § 2699, subd. (i)). (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1145.) More recently, in *Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal. App.. 4th 196, 201-202, the Court noted "Given the potential for recovery of significant civil penalties if the PAGA claims are successful, as well as attorney fees and costs, plaintiffs have ample financial incentive to pursue the remaining representative claims under the PAGA and, thereafter, pursue their appeal from the trial court's order denying class certification."[citing to *Munoz v. Chipotle Mexican Grill, Inc.* (2015) 238 Cal.App.4th 291.[""Generally speaking, the civil penalties available under the PAGA are $100 'for each aggrieved employee per pay period for the initial violation and [$200] for each aggrieved employee per pay period for each subsequent violation.' [Citation.] Seventy-five percent of penalties 'recovered by aggrieved employees' must be distributed to the 'Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights,' with the remaining 25 percent to be distributed to the 'aggrieved employees.' [Citation.] A prevailing PAGA plaintiff may recover his or her attorney fees and costs as well. [Citation.] Thus, where, as here, the purported violator has had many employees with earnings over many pay periods, the recovery could be quite substantial." (*Munoz,* supra, 238 Cal.App.4th at pp. 310-311.)"]] Defendants' vigorous attempts to argue that statements in these cases are dicta and do not show that any employee other than the employee bringing the PAGA action is entitled to penalties is rejected. Defendants engage in a fairly complex yet strained statutory interpretation of Labor Code § 2699 to argue that a PAGA action may only be initiated by an "aggrieved employee" and that penalties recovered only go to an "aggrieved employee." Defendants reason that the statute therefore only allows for recovery of civil penalties by the employee who initiated the action, not non-party employees and that the statute makes no provision for distribution of penalties to non-party employees. However, the California Supreme Court has made clear that the penalties go "not only to the citizen bringing the suit **but to all employees affected by the Labor Code violation**." (*Iskanian, supra,* 59 Cal.4th at 382 [emphasis added].) The Courts, not Defendants, declare the law. In any event, the plain language of Labor Code § 2699(c) defines an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more alleged violations was committed." (Labor Code § 2699(c).) This clearly includes the employees on whose behalf the PAGA action was brought. Further, Labor Code § 2699(i) states that 25% of the civil penalties are distributed to "aggrieved employees" clearly indicating that any employee affected by the violations is entitled to

penalties, not simply the employee that brought the PAGA action.

At oral argument, Defendants urge the Court to adopt the reasoning of an unreported federal case (*Cuningham v. Leslie's Poolmart, Inc.* 2013 WL 3233211). California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority." (*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 251, fn. 6. The Court does not find *Cunningham* persuasive, however. Further, the court does not find *Amaral v. Cintas Corp. No.2*, (2008) 163 Cal. App. 4th 1157 to be apposite [" If an employee successfully recovers an award of civil penalties, PAGA requires that 75 percent of the recovery be paid to the Labor and Workforce Development Agency, with the remaining 25 percent going to the employee."] . Defendants' interpretation cuts too closely. The *Amaral* Court specifically cites to Lab. Code sec. 2699(i), which provides that civil penalties recovered by "aggrieved employees" shall be distributed as mandated. To make clear, Section 2699(a) clearly provides as addressed in the papers and at oral argument, that "any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought **by an aggrieved employee on behalf of himself or herself and other current or former employees** pursuant to the procedures specified in Section 2699.3." [emphasis added] Section 2699.3's repeated reference to "an aggrieved employee" is addressed back to section 2699 (see, e.g. sec. 2699.3 subd. (a)(2)(A), (b), (c)) Had the Legislature intended that nonparties current or former employees are not entitled to recover civil penalties, it could have said so. The Court's role is to determine what the Legislature intended by the statute(s) it enacted. There are no modifiers to the language of section 2699. The plain language of the statute embraces plaintiffs' interpretation.

Moreover, the release precludes the employees from participating in any manner in the PAGA action, even as a witness. (Baker Decl. Exh 2 ¶ 4 [the employees must "execute such documents or take such further action as may be necessary to effectuate your intention to opt-out of any participation in the Smigelski lawsuit." (Id.) Provisions in releases which imply that an employee may not participate in a lawsuit, for example, by contacting the Plaintiff's counsel regarding the events surrounding the action have been found to be misleading. (*Slavkov, supra,* 2015 U.S.Dist.LEXIS 149013 at *13-14.) Further compounding the misleading nature of the communications is the failure to fully explain the nature of Plaintiff's PAGA lawsuit, provide the employees a copy of the lawsuit, or even provide the employees with the contact information of Plaintiff's counsel.

As a result, the communications which Defendants do not deny having made to employees, in which they indicate, among other things, that the employees would not receive anything from the instant lawsuit, fail to provide a copy of the lawsuit or any contact information of Plaintiff's counsel, is at a minimum misleading. Given the misleading nature of the communications, the Court may properly order that a curative notice be sent to the recipients of the communications in addition to invalidating any releases premised on the communications.

To the extent that Defendants argue that Plaintiff lacks standing to seek any rescission of the releases to which he is not a party, the Court disagrees. Plaintiff has been given standing under PAGA to institute the instant action **on behalf of himself and other current and former employees**. (Labor Code § 2699(a).) Further, this PAGA action, as with any PAGA action, "is a representative action on behalf of the State." (*Iskanian, supra*, 59 Cal.4th at 387.) Plaintiff seeks to recover civil penalties in this action on behalf of the State, himself, and other current and former employees. However, Defendants are attempting to obtain releases purporting to limit recovery of these penalties through misleading communications to employees. Plaintiff has standing to challenge these releases. Nor does the fact that Defendants have yet to attempt to utilize the releases as a defense against Plaintiff's action render any order by the Court regarding the releases to be an advisory opinion. As seen above, a class action plaintiff was able to obtain an order invalidating settlement agreements of putative class members in a

case which also involved PAGA claims. (*Slavkov, supra,* 2015 U.S.Dist.LEXIS 149013.) While this is a PAGA representative action and not a class action, the Court sees no reason for any different result.

In addition, absent Court approval, aggrieved employees cannot release the State's right to seek PAGA penalties, another's right to seek penalties on their behalf, or even their own right to share penalties. Yet the releases seek to do just that. While Defendants argue that any releases obtained from nonparty employees of PAGA claims are not subject to review, they are not correct. "The superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part." (Labor Code § 2699(l).) The two cases cited by Defendants to support the proposition that employees who settle underlying wage and Labor Code violations may also release any derivative rights under PAGA arose in the context of a wage and hour class action where the court had already approved a settlement including the release of PAGA claims and simply dealt with the res judicata aspects of the settlements in a later action. (*Waisbein v. UBS Financial Services* (N.D.Cal.2007) 2007 U.S.Dist.LEXIS 621723; *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562.) Defendants are correct that the California Supreme Court stated in *Iskanian, supra*, that "[o]f course, employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations." (*Iskanian*, supra, 59 Cal.4th at 383.) But the Court has already found above that the communications which sought the releases of any PAGA claim were misleading and thus any such release cannot be said to have been freely made. In any event, the releases seek not only to obtain the employees waiver of the right to bring a PAGA claim, but seek a release of any PAGA penalties which would include penalties that the **State** would be entitled to recover. As set forth above, Court approval of such a settlement is required. (Labor Code § 2699(l); see also (*Slavkov, supra,* 2015 U.S.Dist.LEXIS 149013 at *18, fn. 1 [noting the relevance of the failure of the defendants' communications to mention that judicial approval of PAGA claims potentially required judicial approval.) Defendants apparently seek to avoid § 2699(l) by arguing that the releases at issue here involve only releases of Labor Code violations for which no PAGA penalty was actually paid and § 2699(l) only applies where an amount of penalties is actually sought. The Court rejects this interpretation. The term "any penalties" in § 2699(l) must mean a proposed settlement of a PAGA claim where a specific amount or even no amount is attributed to penalties. Otherwise certain settlements would be immunized from Court review.

The Court rejects Defendants' argument that there is no evidence to justify the relief sought. While it is true that Plaintiff provided a single letter sent by Defendants to one employee and a release that employee signed, Defendants do not dispute the authenticity of the letter or the release. In any event, the employee authenticated the documents through a declaration in reply. (Baker Reply Decl. Ex. A.) Nor do Defendants dispute that they are sending out letters to others.

Finally the Court rejects Defendants' argument that the challenges to the releases must be arbitrated because they contain arbitration provisions. Indeed, the releases purport to release the PAGA claims, including the State's right to seek PAGA penalties, and Plaintiff's right to seek such penalties on the employee's behalf. But neither the State, nor Plaintiff, who is acting on behalf of the State in this PAGA action has agreed to arbitrate anything with respect to the releases. Further as noted above, any settlement of a PAGA claim requires Court approval.

The Court, however, rejects Plaintiff's request for expedited discovery regarding Defendants' "solicitation campaign" pursuant to CCP § 2019.020. Plaintiff is free to conduct the discovery that he deems necessary. Indeed, he appears to have a PMK deposition set for March 17, 2016 and has also served RFPs and special interrogatories. While he asks the Court to order Defendants to respond to that written discovery prior to the deposition, the Court sees no need to alter the regular time for discovery responses.

As a result, the motion is granted to the extent that the Court finds that any settlement agreement between Defendants and any current or former employee that release the PAGA claims in the instant

lawsuit is invalid. (*Slavkov, supra,* 2015 U.S.Dist.LEXIS 149013 at *21.) 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 reasoning set forth above. (*Id.* at *22.) The parties are directed to meet and confer on the content of the notice over the next 60 days. At the end of this period, and to the extent that the parties cannot reach an 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. Further, the motion to require Defendants to submit for the Court's approval any future proposed settlement of the PAGA claims identified in Plaintiff's complaint is granted. Finally, Plaintiff's request for expedited discovery is denied.

Defendants' evidentiary objections are overruled, except as to paragraph 6 of the Jantz declaration submitted in reply as to which it is sustained.

Counsel for plaintiffs shall prepare a formal order pursuant to CRC Rule 3.1312 .

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: March 3, 2016

E. Brown, Deputy Clerk s/ E. Brown

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