EXHIBIT 2

LEXSEE 2007 U.S.DIST. LEXIS 89161

ALANIZ, et al., Plaintiffs v. SAM KANE BEEF PROCESSORS, INC., Defendant

Civ. No. CC-07-335

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

2007 U.S. Dist. LEXIS 89161

December 4, 2007, Decided
December 4, 2007, Filed

COUNSEL: [*1] For Edgar Alaniz, on behalf of themselves and all other similarly situated employees, Alfredo Alaniz, on behalf of themselves and all other similarly situated employees, Salvador Lopez, on behalf of themselves and all other similarly situated employees, Plaintiffs: Philip A Downey, LEAD ATTORNEY, Unionville, PA; Alex R Hernandez, Jr, Attorney at Law, Port Lavaca, TX; Kern A Lewis, S Rafe Foreman, Susan E Hutchison, Foreman Lewis & Hutchison PC, Grapevine, TX; Stephen Christopher McMains, Attorney at Law, Corpus Christi, TX.

For Sam Kane Beef Processors, Inc., Defendant: Sam Kane Beef Processors, Inc., David L Barron, LEAD ATTORNEY, Epstein Becker et al, Houston, TX; David L Kane, LEAD ATTORNEY, Attorney at Law, Plano, TX.

JUDGES: HAYDEN HEAD, CHIEF JUDGE.

OPINION BY: HAYDEN HEAD

OPINION

ORDER GRANTING TEMPORARY RESTRAINING ORDER

Pending before the Court is defendant's motion for a preliminary injunction. (D.E. 23) For the reasons discussed below, the Court GRANTS a temporary restraining order.

Plaintiffs bring a collective action suit under the Fair Labor Standards Act of 1938 (FLSA), on behalf of themselves and all similarly situated individuals employed by defendant in Texas since August 10, 2004. *29 U.S.C. § 216(b)*. [*2] The Court has not yet certified a class in this action.

Since initiating this action, plaintiffs have circulated flyers, aired radio announcements and sponsored billboards regarding the suit. These communications explain the general nature of the suit as seeking payment for time spent donning and doffing protective gear, sanitizing equipment and performing other necessary tasks. The announcements placed by counsel for plaintiffs contain no reference to the relevant statute of limitations period in this action. They address all current and former hourly employees of defendant.

Defendant requests that the Court enjoin plaintiff's communications with potential class members as misleading. The Court construes plaintiff's failure to appear for the hearing on the matter as a default justifying grant of the requested relief. More importantly, having considered both sides' briefs on this motion, the Court finds a temporary restraining order appropriate in this case.

District courts have "both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 S.Ct. 2193, 2200, 68 L. Ed. 2d 693 (1981)*. [*3] Nonetheless, due to *First Amendment* concerns implicated in restriction of communication with potential class members, courts must balance the need for limitations with the potential interference with the rights of parties. *Id. at 2200*. Courts have restricted communications with absent or potential class members when the communications were "misleading, coercive, or an improper attempt to undermine *Rule 23*." *Belt v. Emcare, Inc., 299 F.Supp.2d 664, 667 (E.D.Tx. 2003)* (collecting cases).

Suits for back-pay under the FLSA are governed by a two- or (in the case of willful violation) three-year statute of limitations, *29 U.S.C. §255(a)*, whereas plaintiffs' announcements contain no time restriction. These communications are overbroad. They create the misimpression that *any* current or former employee of defendant is eligible to participate in the litigation. They threaten to disrupt defendant's workforce. These misleading announcements create false expectations for those ineligible to sue and possibly burdening the Court with meritless suits.

While plaintiffs' counsel certainly has an interest in reaching potential plaintiffs, misleading commercial speech is not constitutionally protected. *Central Hudson Gas & Elec. Corp., 447 U.S. 557, 100 S.Ct. 2343, 2350, 65 L. Ed. 2d 341 (1980)*. [*4] Further, upon the Court's certification decision, counsel for plaintiffs will be able to communicate freely with all eligible potential plaintiffs, minimizing the burden of this temporary restraint.

IT IS, THEREFORE, ORDERED that plaintiffs and their counsel shall immediately ce ase and desist from mailing, distributing or communicating through radio or other media, the communications attached as Exhibits "A" and "D" to defendant's Motion for Preliminary Injunction. (D.E. 23).

IT IS FURTHER ORDERED that plaintiffs and their counsel shall immediately remove any copies of Exhibit A from all locations where such documents have been posted or left for distribution.

IT IS FURTHER ORDERED that plaintiffs and their counsel shall arrange the removal or covering of billboards soliciting potential plaintiffs in this matter without reference to the dates of their employment.

Plaintiffs may request relief from this injunction. The parties have consented to extending the effect of this order until the hearing on class certification. *FED.R.CIV.P. 64(b)*.

So ORDERED this 4th day of December, 2007.

/s/ Hayden Head

HAYDEN HEAD

CHIEF JUDGE

WILLIAM B. BLANCHARD, on behalf of himself and all others who sold, relinquished rights in or were deprived of ownership of shares of EdgeMark Financial Corporation common stock on or after April 1, 1993 and on or before November 1, 1993, Plaintiff, v. EDGEMARK FINANCIAL CORPORATION, ROGER A. ANDERSON, and CHARLES A. BRUNING, DOE GROUP I, DOE GROUP II and OLD KENT FINANCIAL CORPORATION, Defendants.

No. 94 C 1890

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1998 U.S. Dist. LEXIS 15420

September 11, 1998, Decided
September 14, 1998, Docketed

DISPOSITION: [*1] Plaintiffs' Objections to Settlement and Motion for Sanctions granted in part and denied in part. Plaintiffs' Motion to Set Aside and Vacate Release of Beale's Claims in This Action and Related Circuit Court of Cook County Action denied in its entirety. Defendants' Motion to Disqualify Reuben Hedlund and Hedlund, Hanley & John from Further Representation of Plaintiff Class denied. Defendants' Motion for Evidentiary Hearing denied.

COUNSEL: For JOSEPH S. BEALE, PLAINTIFF: REUBEN L. HEDLUND, PIA NORMAN, HEDLUND, HANDLEY & JOHN, CHICAGO, IL.

For EDGEMARK FINANCIAL CORPORATION, ROGER A ANDERSON, CHARLES A BRUNING, defendants: Paul E. Freehling, Victoria Hallock, D'Ancona & Pflaum, Chicago, IL.

For EDGEMARK FINANCIAL CORPORATION, ROGER A ANDERSON, CHARLES A BRUNING, OLD KENT FINANCIAL CORPORATION, defendants: William K Holmes, Warner, Norgross & Tudd, Grand Rapids, MI.

For EDGEMARK FINANCIAL CORPORATION, ROGER A ANDERSON, CHARLES A BRUNING, defendants: Daniel Roy Gravelyn, Warner, Norcross & Judd LLP, Grand Rapids, MI.

JUDGES: Wayne R. Andersen, United States District Judge.

OPINION BY: Wayne R. Andersen

OPINION

[*2] **MEMORANDUM OPINION AND ORDER**

This matter is currently before the court upon various motions of the parties including plaintiffs' Objections to the Settlement and Motion for Sanctions, plaintiffs' Motion to Set Aside and Vacate the Release of Beale's Claims in This Action and the Related Circuit Court of Cook County Action, defendants' Motion to Disqualify Reuben Hedlund and Hedlund, Hanely & John from Further Representation of the Plaintiff Class, and defendants' Motion for an Evidentiary Hearing.

On August 25, 1997, Magistrate Judge Martin C. Ashman filed and served upon the parties his Report and Recommendation granting in part and denying in part plaintiffs' Objections to the Settlement and Motion for Sanctions, denying in its entirety plaintiffs' Motion to Set Aside and Vacate the Release of Beale's Claims in This Action and the Related Circuit Court of Cook County Action, and denying defendants' Motion to Disqualify Reuben Hedlund and Hedlund, Hanely & John from Further Representation of the Plaintiff Class. The defendants subsequently filed their objections to the Magistrate Judge's Report and Recommendation [*3] with this court and, one day later, their Motion for an

Evidentiary Hearing.

After a careful consideration of the Magistrate Judge's Report and Recommendation, the EdgeMark defendants objections thereto, the motions and memoranda of law filed by the parties, and other relevant pleadings, this court hereby adopts in full the Magistrate Judge's Report and Recommendation. For the reasons set forth below, we also deny defendants' Motion for an Evidentiary Hearing.

BACKGROUND

The motions currently pending before the court arise out of a series of lawsuits filed by the parties in both state and federal court. Merchandise National Bank ("MNB"), a subsidiary of Old Kent Bank's predecessor, defendant EdgeMark Financial Corporation ("EdgeMark"), filed a state court collection action in 1993 against Joseph S. Beale ("Beale"), seeking payment on two promissory notes. The principal amount of these notes totaled more than $ 2.5 million, the first in the principal amount of $ 1,750,000.00 and the second in the amount of $ 758,854.00.

On March 25, 1994, Beale filed a federal class action against EdgeMark Financial Corporation, Roger A. Anderson, and Charles A. Bruning (collectively "the [*4] EdgeMark defendants"), wherein he asserted claims on behalf of himself and a class of current and former common stockholders of EdgeMark "who sold shares of EdgeMark common stock during the period beginning June 1, 1993 and ending November 1, 1993." In this original complaint, Beale, as the class representative, alleged that the EdgeMark defendants deliberately concealed from the shareholders the fact that the company would be sold to Old Kent Financial Corporation ("Old Kent"), another bank holding company, at a price vastly in excess of the current price of its shares.

On July 15, 1994, Beale filed a two-count amended complaint against the EdgeMark defendants on behalf of himself and a class defined as "all persons who sold, relinquished rights in or were deprived of ownership of shares of EdgeMark common stock on or after April 1, 1993 and on or before November 1, 1993." In Count I, Beale alleged that the EdgeMark defendants violated the Securities and Exchange Act of 1934, *15 U.S.C. § 78j(b)*, when they schemed to withhold material information related to the sale of EdgeMark stock. In Count II, Beale alleged the same facts under a theory of equitable fraud.

Subsequently, on August [*5] 1, 1995, this court certified this litigation as a class action when we adopted in full the Magistrate Judge's Report and Recommendation granting Beale's motion for class certification pursuant to *Fed. R. Civ. P. 23(b)(3)*. Thereafter, plaintiffs filed a second amended complaint to include additional p arties, including Old Kent, and causes of action, including a claim for insider trading. Since then, plaintiffs have filed a third amended complaint and an amended third amended complaint which, while modifying certain allegations, assert the same claims as the second amended complaint.

In addition to the federal class action, Beale filed a discovery petition in Illinois state court seeking the production of a letter EdgeMark sent to the National Association of Securities Dealers, Inc. ("NASD") in response to NASD's inquiry concerning suspicious trading activity which allegedly occurred immediately prior to the announcement of EdgeMark's sale to Old Kent. While Beale was the only named plaintiff in the discovery petition, plaintiffs contend that the action was intended to benefit all of the class members because the document allegedly contained information which may have provided evidence [*6] of insider trading by individuals or married couples who had relationships with EdgeMark, thereby making them privy to information concerning EdgeMark's sale to Old Kent.

On June 9, 1994, Cook County Circuit Judge Kenneth L. Gillis granted Beale's petition and ordered EdgeMark to produce the NASD letter. EdgeMark refused and appealed the order of the trial court. The Illinois Appellate Court affirmed the decision of the trial court on March 29, 1996. *Beale v. EdgeMark Fin. Corp., 279 Ill. App. 3d 242, 215 Ill. Dec. 905, 664 N.E.2d 302 (1996)*. The Illinois Supreme Court subsequently denied leave to appeal on October 2, 1996, thereby making Judge Gillis' decision final. Throughout the course of the discovery petition suit and the federal class action, Beale was represented by Reuben L. Hedlund of Hedlund, Hanley & John. For purposes of the MNB litigation, however, Beale was represented by attorney Paul Carroll ("Carroll").

At this point, the events which resulted in the motions currently before the court began to unfold. On May 29, 1996, Carroll approached the defendants on behalf of Beale in an effort to ascertain the defendants' interest in settlement. After consulting with his [*7] clients, defendants' counsel, attorney Daniel R. Gravelyn ("Gravelyn") of Warner, Norcross & Judd, informed Carroll that the defendants would only entertain settlement negotiations for the purpose of resolving all of the outstanding claims between the parties. Carroll apparently assented to this request and the settlement negotiations proceeded with Gravelyn acting on behalf of the defendants and Carroll acting on Beale's behalf. On June 12, 1996, the parties executed a settlement agreement which resolved all of the claims between Beale and the defendants.

In the settlement agreement, Beale agreed to pay $ 100,000 and to release all of his claims against the defendants, including his discovery petition claim and his

class claims, in exchange for the defendants' forgiveness of his indebtedness on the two notes which were the subject of the MNB litigation and the release of certain property which Beale had pledged to secure this indebtedness. Although Beale agreed to release all of his claims against the defendants, the settlement agreement expressly provided that the class action would continue and provided the class a reasonable period of time in which to find a suitable representative [*8] to replace Beale. The settlement agreement also allowed Hedlund to seek a substitute plaintiff for Beale in the Illinois discovery petition suit.

After it became apparent that the parties would not present this settlement agreement to the court for review and approval, the plaintiffs filed their Objections to the Settlement and Motion for Sanctions, and later, their Motion to Set Aside and Vacate the Release of Beale's Claims in This Action and the Related Circuit of Cook County Action. Defendants then filed their Motion to Disqualify Reuben Hedlund and Hedlund, Hanley & John from Further Representation of the Plaintiff Class. The Magistrate Judge filed and served upon the parties his Report and Recommendation concerning these motions on August 25, 1997. On September 26, 1997, the EdgeMark defendants filed their objections to the Magistrate Judge's Report and Recommendation and, one day later, their Motion for an Evidentiary Hearing.

LEGAL STANDARD

In reviewing a magistrate judge's report and recommendation, the district court generally must "make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition [*9] to which a specific written objection has been made." *Fed. R. Civ. P. 72(b)*. This "de novo determination" does not require a new hearing, but simply means that the district court must give "fresh consideration to those issues to which specific objections have been made." *Rajaratnam v. Moyer, 47 F.3d 922, 925 n.8 (7th Cir. 1995)* (quoting 12 Charles A. Wright et al., Federal Practice and Procedure § 3076.8 (Supp. 1994)); see also *Goffman v. Gross, 59 F.3d 668, 671 (7th Cir. 1995)*.

When, as here, the magistrate judge issues a report and recommendation on a nondispositive pretrial matter, the district court must apply a more deferential standard of review. In such circumstances, the Federal Rules of Civil Procedure provide that "the district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." *Fed. R. Civ. P. 72(a)*. Similarly, *28 U.S.C. § 636(b)(1)(A)* provides, in relevant part, that "[A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court . . . . A judge of the court may reconsider [*10] any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." *28 U.S.C. § 636(b)(1)(A)*.

Therefore, both *Fed. R. Civ. P. 72(a)* and *Section 636(b)(1)(A)* allow the district court to modify or reverse a magistrate judge's ruling on a nondispositive motion only if it is "clearly erroneous or contrary to law." A finding is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985)* (internal quotations omitted). Here, defendants concede, and we think correctly, that the "clearly erroneous or contrary to law" standard applies to the instant motions. We find that the Magistrate Judge's decision on these motions more than satisfies this standard and, as the following analysis demonstrates, also survives a more stringent de novo review. With this standard in mind, we address each of the above-referenced motions in turn.

DISCUSSION

I. Plaintiffs' Objections to the Settlement and Motion for Sanctions and Plaintiffs' [*11] Motion to Set Aside and Vacate

Plaintiffs contend that, because the settlement agreement was not presented to the court for review and approval, the defendants obtained the settlement agreement in violation of *Fed. R. Civ. P. 23*. Plaintiffs further object to the settlement agreement on the grounds that it was executed without the consent of either Reuben Hedlund or the law firm of Hedlund, Hanley and John and, therefore, was obtained in violation of Illinois Rule of Professional Conduct 4.2. We address each argument in turn, beginning with whether defendants violated *Fed. R. Civ. P. 23* by failing to present the settlement for judicial review and approval.

A. *Federal Rule of Civil Procedure 23(e)*: Requirement of Court Approval

Federal Rule of Civil Procedure 23 governs the certification and administration of class actions in federal district courts. *Federal Rule of Civil Procedure 23(e)* provides that a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs." *Fed. R. Civ. P. 23(e)*. Plaintiffs contend that defendants [*12] violated *Rule 23(e)* by failing to submit the settlement agreement to the court for review and approval prior to its execution. Defendants counter that, because the agreement settled only Beale's individual claims and did not prejudice the substantive rights of the remaining class members, *Rule 23(e)* does

not apply to the present situation.

As the Magistrate Judge correctly noted, class actions impose special duties on the court, class counsel, and the class representative. The Supreme Court, in describing the responsibilities of the class representative, has noted:

> he sues, not for himself alone, but as a representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity . . . He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent.

[*13] *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549-50, 69 S. Ct. 1221, 1227, 93 L. Ed. 1528 (1949)*. Thus, by assuming a representative role on behalf of the alleged class, a class representative voluntarily accepts a fiduciary obligation towards the members of the class that may not be abandoned at will or by agreement with the defendant if prejudice to the class members would result or if the class representative has inappropriately used the class mechanism for his personal gain. *Shelton v. Pargo, Inc., 582 F.2d 1298, 1305 (4th Cir. 1978)*; see also *Young v. Higbee Co., 324 U.S. 204, 213, 65 S. Ct. 594, 599, 89 L. Ed. 890 (1945)* (noting that class representatives cannot litigate in the interests of the class and then "trade in the rights of others for their own aggrandizement").

While the class representative shares a fiduciary relationship with the other members of the class, the divergent interests that are often at stake in class litigation create a potential for abuse. Thus, the court has the responsibility of protecting the interests of the absent class members. See *Grunin v. International House of Pancakes, 513 F.2d 114, 123* (8th Cir.) (acknowledging that [*14] "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members"), cert. denied, *423 U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975)*; *Runion v. U.S. Shelter, 98 F.R.D. 313, 318 (D.S.C. 1983)* (same). In fulfilling its role as guardian of the absent class members' interests, the court has both the power and duty, as set forth in *Rule 23(d)* and *(e)*, to ensure that the class representative and class counsel do nothing to compromise or otherwise prejudice the interests of those whom they have undertaken to represent. *Shelton, 582 F.2d at 1306*.

In light of these responsibilities, we agree with the Magistrate Judge that, once the class has been certified, a class representative seeking to settle his individual claims must submit the settlement to the court for judicial review and approval pursuant to *Fed. R. Civ. P. 23(e)*. Defendants now object to this conclusion arguing that the only limitation on a defendant's freedom to settle with individual class members is that the settlement not affect adversely the interests of the non-settling class members. In doing so, defendants point to the fact that the settlement agreement in this case [*15] explicitly provided that the rights of the class members remained unaffected. This, defendants reason, ensured that the settlement did not prejudice the class which, in turn, excuses their failure to comply with *Rule 23(e)*. (Defendants' Obj. at 10).

We find, as did the Magistrate Judge, that this argument trivializes the importance of judicial review in the class context. The judicial review procedure allows the court to examine whether the class representative invoked the class mechanism in order to obtain a higher sum from the defendant in settlement of his own personal claims thereby impairing the rights of the remaining class members. See *Caston v. Mr. T's Apparel, Inc. 157 F.R.D. 31, 33 (S.D. Miss. 1994)*. The judicial review procedure also enables the court to determine whether the interests of the remaining class members may be harmed by virtue of their reliance upon the named plaintiff's representations that he would represent diligently and adequately their interests. Id. These determinations must be made by the court as guardian for the non-settling members and not, as defendants would have it, by the parties to the settlement.

Nonetheless, defendants argue that [*16] *Rule 23* has no application when, as here, the settlement encompasses only individual claims and not the class action in its entirety. In support of this argument, defendants rely on a number of cases that purportedly stand for the proposition that an absent class member can settle his individual claims without court approval. See *In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1138-40* (7th Cir.), cert. denied, *444 U.S. 870, 100 S. Ct. 146, 62 L. Ed. 2d 95 (1979)*; *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l., 455 F.2d 770, 774-75 (2d Cir. 1972)*; *Rockler & Co., Inc. v. Minneapolis Shareholders Co., 425 F. Supp. 145, 150 (D. Minn. 1977)*; *Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461, 464 (N.D. Ind. 1976)*. We find that these cases are distinguishable in so far as they fail to address whether the representative of a certified class seeking to settle his claims must comply with *Rule 23(e)*.

We conclude, as did the Magistrate Judge, that there are significant differences between absent class members

and the class representative which mandate a different result when the class representative is the settling party. As noted above, the [*17] class representative, by voluntarily assuming the role of named plaintiff, assumes a fiduciary duty to act in the best interests of the class, or at the very least, not to do anything that would prejudice the claims of those he has elected to represent. Moreover, while settlement with any individual member of the absent plaintiff class does not comprise the class action itself, without the class representative, the class action may be subject to dismissal if a suitable replacement is not found. *Shelton, 582 F.2d at 1305.*

Because the class representative fulfills a unique role in the class process, we agree with the Magistrate Judge that it is imperative that the court review the settlement with the named plaintiff to ensure that it will not prejudice or compromise any substantive rights of the remaining class members. The court will also have the opportunity to assess whether the class representative abused his role to further his own self interest, and whether the loss of the class representative will jeopardize the ongoing viability of the class action. Indeed, "*Rule 23(e)* was designed to prevent . . . settlements by the named plaintiffs which could frustrate the interests of [*18] the absent class members." NEWBURG ON CLASS ACTIONS, § 15.26 at 15-79. For these reasons, we conclude that the proper course was for defendants to seek court approval of the settlement pursuant to *Rule 23(e).*

In summary, we agree with the Magistrate Judge that defendants violated *Rule 23* by failing to submit the settlement for judicial review and approval prior to its execution. The defendants, as proponents of the settlement, shoul dered the burden of demonstrating to this court the fairness of the settlement agreement to the remaining class members. In failing to do so, defendants have violated *Rule 23*. We now turn to whether defendants have violated Rule 4.2 of the Illinois Code of Professional Conduct.

B. Illinois Rule of Professional Conduct 4.2

Illinois Rule of Professional Conduct 4.2, commonly known as the "anti-contact rule," provides that

> During the course of representing a client a lawyer shall not communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized [*19] by law.

ILLINOIS CODE OF PROFESSIONAL CONDUCT, Rule 4.2 (1997). Plaintiffs contend that Gravelyn was aware that Hedlund was class counsel when he began settlement negotiations with Carroll. Nevertheless, plaintiffs claim that Gravelyn proceeded to conduct settlement negotiations with Carroll which ultimately resulted in the settlement of all claims between Beale and the defendants. Plaintiffs argue that Gr avelyn violated Rule 4.2 by engaging in these settlement negotiations without obtaining the permission of Hedlund.

"Once a class has been certified, the [ethical] rules governing communications apply as though each class member is a client of class counsel. Under accepted ethical principles, defendants and their attorneys may communicate on matters regarding the litigation with class members who have not opted out, *but only through class counsel*." MANUAL FOR COMPLEX LITIGATION, § 30.2 at 234 (3d ed. 1995) (emphasis added); see also NEWBERG ON CLASS ACTIONS, § 15.18 at 15-49 (3rd ed. 1992). In the present case, it is undisputed that the only attorney of record in the class action at the time of the settlement negotiations was Hedlund. It is also undisputed that [*20] the settlement negotiations addressed Beale's claims in the class action without the informed consent or participation of class counsel.

Despite these undisputed facts, defendants argue that they did not violate Rule 4.2 because they did not communicate directly with Beale and, therefore, never communicated with a "party" as forbidden by Rule 4.2. We agree with the Magistrate Judge that such indirect communications pose many of the same risks that would have been present had Gravelyn communicated with Beale directly. While Gravelyn may not have communicated directly with Beale, we have no doubt that Carroll conveyed Gravelyn's communications to Beale. Thus, Carroll was the means by which Gravelyn communicated with Beale. This court cannot permit an attorney to do indirectly through a third person what he cannot do directly under the Illinois Code of Professional Conduct.

The argument advanced by defendants that Gravelyn did not violate the "anti-contact rule" because he communicated through non-class counsel is neither novel nor unprecedented. At least two courts have rejected this argument under circumstances similar to the present case. See Larry James Oldsmobile-Pontiac-GMC [*21] *Truck Co. v. General Motors Corp., 175 F.R.D. 234, 245 (N.D. Miss. 1997)* ("This court . . . shall not grant credence to defense counsel's discharming assertions that they did not violate Rule 4.2 because they did not communicate directly with a party."); *In re Airline Ticket Comm'n Antitrust Litig., 1996 U.S. Dist. LEXIS 20361*, No. MDL 1058, 1996 WL 585301, at *2 (D. Minn. Aug. 12, 1996) ("That defendants' counsel conducted their negotiations with represented parties is without

significance. . . . It is the court-appointed class counsel who represent the plaintiff class members in this case.").

Nonetheless, defendants argue, as they did before the Magistrate Judge, that the presence of Carroll militates in favor of a finding that Rule 4.2 was not violated because Carroll was Beale's chosen counsel for purposes of the negotiations. Additionally, defendants assert that Carroll was fully capable of protecting Beale's interests because he was counsel of record in the MNB litigation and had asserted claims on Beale's behalf that were similar to the federal securities claims at issue in the class suit. As defendants put it, "Beale was *represented* by Carroll who had filed a pleading (in the state court) which [*22] contained virtually the identical allegations as Beale made here. Carroll's signature on that pleading constituted his certification that he stood behind those allegations." (Defendants' Obj. at 12).

We agree with the Magistrate Judge that, although Beale may have chosen Carroll to represent him during the settlement negotiations thereby consenting to Gravelyn's communications, his consent does not remove such communications fro m the purview of Rule 4.2. *Faison v. Thornton, 863 F. Supp. 1204, 1213 (D. Nev. 1993)*; ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT at § 71:302 (June 22, 1988). Indeed, the "no-contact" rule is aimed at preventing opposing counsel from using his superior knowledge and skill to take advantage of the other party who is unrepresented in the negotiations. For this reason, an opposing lawyer must obtain the consent of the adverse party's lawyer in order to communicate ethically with the adverse party. See *Faison, 863 F. Supp. at 1213* (citing *Frey v. Department of Health and Human Services, 106 F.R.D. 32 (E.D.N.Y. 1985))*.

Further, we reject defendants contention that Carroll was capable of protecting the interests of Beale and the other class plaintiffs. [*23] While Carroll was capable of protecting the interests of Beale in the MNB litigation, he presumably was not sufficiently knowledgeable about the class litigation to protect the interests of Beale and the other members of the class. As the Magistrate Judge correctly noted, the ramifications of the settlement agreement support this conclusion. As a result of the settlement, Beale breached his fiduciary obligations by acting to the detriment of the class in obtaining a favorable settlement of his individual claims. The settlement also adversely affected Beale's relationship with Hedlund in so far as the settlement forced Hedlund to withdraw as Beale's counsel in the class litigation.

Finally, we agree with the Magistrate Judge that Hedlund's apparent acquiescence to the negotiations is insufficient to remove this case from the ambit of Rule 4.2. While Hedlund may have been aware of the negotiations and did not object or attempt to intervene, there is no indication that Hedlund affirmatively consented to the communications. We have not discovered, nor have defendants cited, any authority that would excuse such an ethical violation merely because the party's counsel failed to take affirmative [*24] steps to prevent the communication. As the Magistrate Judge correctly noted, it is the responsibility of each lawyer to make sure that his or her conduct is in compliance with the pertinent ethical rules. Therefore, we reject defendants' contention that Gravelyn should be excused from his unethical conduct because Hedlund did nothing to prevent it.

In conclusion, we find that Gravelyn, without the consent of class counsel, communicated with Beale in an effort to settle Beale's claims in this class litigation. Accordingly, we agree with the Magistrate Judge that Gravelyn violated Rule 4.2 of the Illinois Code of Professional Conduct. We now turn to what sanctions, if any, this court should impose as a result of defendants' conduct.

C. Appropriate Sanctions

In seeking sanctions for the defendants' conduct, plaintiffs allege that the class has been harmed in a number of ways. First, plaintiffs claim that the settlement has drastically reduced both the potential recovery for the class and defendants' potential liability. Second, plaintiffs assert that as a result of the settlement defendants have withheld production of the NASD letter which was the subject of the state discovery [*25] petition suit. Third, plaintiffs maintain that the remaining members of the class will be forced to shoulder disproportionately the burden of attorneys' fees. Fourth, plaintiffs allege that the class has been deprived of a class representative with the largest claim and the greatest incentive and resources to prosecute this action. Finally, plaintiffs claim tha t the conduct of defendants have caused significant delay and expense to the class.

In order to alleviate this prejudice, plaintiffs asked the Magistrate Judge to impose the following sanctions: (1) the establishment of an escrow fund of $ 2.4 million which plaintiffs claim is the value of Beale's settlement; (2) the production of the NASD letter that is the subject of the state court discovery petition; (3) the payment of attorneys' fees and costs incurred as a result of the filing of the instant motions and the ongoing costs of this litigation; and (4) the disqualification of Gravelyn and his law firm Warner, Norcross, & Judd from further representation in this case. According to plaintiffs, these sanctions are necessary to "repair the damage caused by Old Kent/EdgeMark's machinations." (Mot. for Sanctions at 15).

As the [*26] Magistrate Judge correctly noted, courts have "the inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal" which "necessarily includes the authority to

impose reasonable and appropriate sanctions upon errant lawyers practicing before it." *Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1209 (11th Cir. 1985)* (citations omitted); *Magnus Electronics, Inc. v. Masco Corp., 871 F.2d 626, 632* (7th Cir.), cert. denied, *493 U.S. 891, 110 S. Ct. 237, 107 L. Ed. 2d 188 (1989)*; *In re Air Crash Disaster Near Roselawn, Ind., 909 F. Supp. 1116, 1124 (N.D. Ill. 1995)*. Such sanctions may include the award of attorneys' fees and costs, disqualification of counsel, or the imposition of monetary penalties. *Kleiner, 751 F.2d at 1209* (citations omitted). Thus, we must determine which, if any, of these sanctions are just and appropriate under the circumstances of this case.

In determining whether sanctions are appropriate, we must "consider the seriousness of the violations and whether the violations were intentional, as well as the nature and extent of prejudice suffered or likely to be suffered by the parties in the future [*27] as a result of the violation." In *Re Air Crash Disaster Near Roselawn, 909 F. Supp. at 1124-25* (citing *In re American Airlines, Inc., 972 F.2d 605, 611 (5th Cir. 1992)*, cert. denied, *507 U.S. 912, 113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993))*. After a careful consideration of these factors, we agree with the Magistrate Judge that defendants' violations of *Fed. R. Civ. P. 23(e)* and Rule 4.2 were both serious and intentional. Therefore, as discussed below, we find that sanctions are just and appropriate under the present circumstances.

We begin with the defendants' attempt to bypass this court's authority to review and approve the settlement pursuant to *Rule 23(e)*. The Magistrate Judge concluded that the defendants engaged in conduct intentionally designed to circumvent this court's authority under *Rule 23*. In reaching this conclusion, the Magistrate Judge first determined that this court's August 1, 1995 Order adopting his Report and Recommendation granting Beale's motion for class certification put defendants on notice that they were required to present any settlement to the court for review and approval pursuant to *Rule 23(e)*. The Magistrate Judge also relied on a letter [*28] Carroll wrote informing defendants that any settlement of Beale's individual claims would have to be submitted to the court for approval.

Defendants now object to this conclusion arguing that in its August 1, 1995 order "this Court never stated that prior court approval would be required for Beale to settle his individual claims." (Defendants' Obj. at 10). It follows, the argument continues, that this order "could not possibly have put Gravelyn on notice that prior approval of Beale's individual settlement was required, and Gravelyn's failure to obtain such approval cannot be considered intentional." (Id.). Similarly, defendants argue that the letter written by Carroll merely cautioned that dismissal of the state discovery petition suit might arouse the ire of the federal court. Defendants claim that this concern "became entirely moot" when the parties provided in the settlement agreement that the discovery petition action would not be dismissed. (Id.).

This court, in granting Beale's motion for class certification, recognized the importance of requiring the parties in this litigation to submit any settlement to this court for review and approval. In contesting Beale's motion [*29] for class certification, defendants argued that Beale had conflicts of interest that would cause him to have a natural inclination to favor his other claims over those of the putative class members. In addressing these concerns, this court noted that it would have to approve any settlement to insure that Beale did not shirk his duties as a class representative even though his individual claim may suffer. While this court did not specifically discuss the settlement of Beale's individual claims, we find that this order put the defendants on notice that court approval was necessary to insure that Beale did not shirk his duties as class representative regardless of the form of the settlement.

Additionally, we agree with the Magistrate Judge that Carroll informed defendants that they would have to seek judicial review and approval of the settlement. In a letter dated June 11, 1996, Carroll stated:

> given that the Federal District Court has certified the class, any settlement with Beale on an individual basis will have to be reviewed by the Court, to determine, among other things, whether the dismissal [of the discovery petition] in any way prejudices the unnamed class members. [*30] Clearly, the discovery sought in the Discovery Petition has a direct impact on the claims of the class members and it is doubtful that the Federal District Court would approve the settlement with Beale unless the Discovery Petition remains pending.

In response to this letter, the parties deleted that portion of the agreement which provided for the dismissal of Beale's state and federal court claims. The parties apparently deleted this language because, as Carroll's letter acknowledges, they felt that it was "doubtful" the court would approve the dismissal of Beale's state and federal claims. In other words, the parties felt that deleting the language would enhance the probability that this court would approve the settlement. Nonetheless, defendants failed to present the settlement to this court. In doing so, defendants intentionally circumvented this court's authority under *Rule 23(e)*.

Likewise, we agree with the Magistrate Judge that defendants intentionally violated Illinois Rule of

Professional Conduct 4.2. There is no dispute that Gravelyn was aware that Hedlund represented Beale in both the federal class action and the state discovery petition suit. It is also undisputed [*31] that the initial drafts of the settlement agreement provided for Hedlund's signature. Thus, Gravelyn was aware that he needed Hedlund's approval of the communication and agreement. But rather than obtain Hedlund's permission to proceed with the negotiations or his approval of the settlement, Gravelyn decided to execute the settlement agreement without any approval from Hedlund. This conduct constitutes an intentional violation of Rule 4.2, and we do not believe that Hedlund's apparent awareness of the settlement negotiations or his failure to intervene or prevent them from transpiring excuses such a violation.

Finally, we agree with the Magistrate Judge that the settlement the defendants procured has prejudiced the remaining members of the class. The plaintiffs have been forced to expend time and money in filing these motions and responding to defendants' motions to disqualify. Additionally, the remaining members of the class will be forced to shoulder disproportionally the burden of attorneys' fees. Further, because Beale is no longer a party to this suit, the facts and evidence pertinent to his claims may no longer be admissible. In light of these concerns, this court finds that [*32] sanctions are appropriate. We agree with the Magistrate Judge that, because the settlement has been executed and may not now be undone, these sanctions should be designed to reduce the effect of the settlement on this case going forward.

Therefore, in order to remedy the prejudice caused by the settlement agreement and to deter others from engaging in similar conduct, this court disqualifies Gravelyn from further representation of the defendants in this case. This disqualification order means that Gravelyn may not assist or otherwise participate in the defense of this case. This disqualification does not extend to Gravelyn's law firm, Warner, Norcross & Judd. In reaching this conclusion, we reject defendants' contention that this sanction is improper because the disqualification of the most knowledgeable attorney for EdgeMark is potentially outcome-determinative. This court is confident that the lawyers currently representing the defendants in this matter will adequately and diligently represent the interests of the defendants, and this court will ensure that they have a sufficient opportunity to prepare their case.

We also order that defendants shall pay the reasonable attorneys' [*33] fees and costs associated with the plaintiffs' motion to set aside and vacate the release and the plaintiffs' objections to the settlement and motion for sanctions. Moreover, this court orders that, in the event plaintiffs prevail in this litigation, the defendants shall pay Beale's pro-rata portion of the attorneys' fees in order to ensure that the remaining class plaintiffs are not forced to shoulder disproportionately the burden of attorneys' fees. Finally, in order to reduce the effect of the settlement on the merits of this case, we order that any facts that would have been relevant and admissible if Beale's claims were not released remain relevant and admissible.

While this court does not frequently sanction attorneys, we recognize that it is our responsibility to ensure that lawyers follow the pertinent ethical rules and, in the case of a breach, to limit any resulting prejudice to the litigants. This responsibility takes on an added significance when, as here, the interests of absent class members are at stake. We believe that the sanctions outlined above are the most appropriate means by which to protect the interests of these absent class members. At the same time, we believe [*34] that these sanctions are appropriate in light of defendants' intentional conduct and will deter future wrongdoing. In reaching this conclusion, we acknowledge that the defendants are not solely responsible for the events which spawned the instant motions. Both Beale and Carroll played a significant role in the events which resulted in the settlement of Beale's individual claims. Nonetheless, Carroll has not filed an appearance in this case and thus is outside the purview of this court's jurisdiction, and the parties have not requested that this court review the propriety of issuing sanctions against Beale.

In summary, because the parties have executed the settlement agreement, this court denies plaintiffs' Motion to Set Aside and Vacate the Release of Beale's Claims in This Action and the Related Circuit of Cook County Action. Nonetheless, this court concludes that the sanctions outlined above are appropriate in light of defendants' intentional conduct and the resulting prejudice to the class plaintiffs. Accordingly, plaintiffs Objections to the Settlement and Motion for Sanctions is granted in part and denied in part.

II. Defendants' Motion to Disqualify Reuben Hedlund and Hedlund, [*35] Hanley & John from Future Representation of the Class

Defendants contend that, because Hedlund sought to set aside part of the settlement, Hedland had adopted a position contrary to the interests of his then client, Joseph S. Beale. Defendants contend that Hedlund, by adopting this position, has violated Illinois Rule of Professional Conduct 1.7 and/or Rule 1.9. Defendants request that this court exercise its inherent power to supervise attorneys practicing before it and disqualify Hedlund and his law firm Hedlund, Hanley & John from future representation of the plaintiff class.

Illinois Rule of Professional Conduct 1.7 prohibits an attorney from representing a client if the

representation would be directly adverse to another client unless the lawyer reasonably believes that such representation will not adversely affect the relationship with the other client and each client consents. ILLINOIS RULES OF PROFESSIONAL CONDUCT, Rue 1.7 (1997). Similarly, Rule 1.9, which governs conflicts of interest with former clients, provides that an attorney who formerly represented a client in a matter may not represent another person in the same or substantially related matter in which that person's [*36] interests are materially adverse to the interests of the former client, unless the former client consents. RULES OF PROFESSIONAL CONDUCT, Rule 1.9 (1997).

Before addressing the merits of defendants' motion, we must first determine which of the above two rules apply to the instant motion. In the present case, Hudlund filed and the Magistrate Judge granted his motion to withdraw as counsel for Beale effective January 7, 1997. One month earlier, however, Hedlund filed the motion to set aside and vacate the release of Beale's claims. Therefore, we agree with the Magistrate Judge that, because Hedlund allegedly took a position adverse to his client while he was Beale's attorney of record, Rule 1.7 is the pertinent rule for purposes of defendants' motion to disqualify Hedlund and his law firm Hedlund, Hanley & John. With this legal standard in mind, we now turn to the merits of the instant motion.

In opposing defendants' motion, plaintiffs first argue that defendants lack standing to bring this motion. In doing so, plaintiffs note that it is only the defendants who seek to disqualify class counsel and no other class members have joined in the motion. The official comment to Rule 1.7 provides [*37] that:

> resolving questions of conflicts of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question where there is reason to infer that the lawyer has neglected the responsibility . . . . Where the conflict is such as to clearly call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique for harassment.

Thus, absent evident clearly calling into question the fair or efficient administration of justice, a party has no standing to seek disqualification of opposing counsel. *In re Sandahl, 980 F.2d 1118, 1121 (7th Cir. 1992)*; *Tizes v. Curcio, 1997 U.S. Dist. LEXIS 2930*, No. 94 C 7657, 1997 WL 116797, at *2 (N.D. Ill. Mar. 12, 1997); *Thomas & Betts Corp. v. Panduit Corp., 1995 U.S. Dist. LEXIS 7181*, No. 93 C 4017, 1995 WL 319635, at *2 (N.D. Ill. May 25, 1995).

In the present case, there is no evidence upon which we could conclude that the alleged conflict has called into question the fair and efficient administration of justice. Any conflict of interest in this case, assuming one exists, is [*38] minimal because Hedlund did not seek to vacate the entire settlement. To the contrary, Hedlund sought only to vacate the release of Beale's state and federal court claims. Because the parties have executed the settlement agreement and Beale has already received its full benefit, we agree with the Magistrate Judge that it is difficult to discern how such an action could have been materially adverse to Beale's interests. Further, if a conflict did exist, it neither impaired the progress of the case nor prejudiced the class. Because there is no evidence that the fair and efficient administration of justice has been harmed, defendants lack standing to seek Hedlund's disqualification.

Additionally, even if defendants did have standing, we agree with the Magistrate Judge that no conflict exists in this cas. As class counsel, Hedlund has a responsibility not only to protect the class representative, but also to advance the best interests of the class as a whole. See *Parkerv. Anderson, 667 F.2d 1204, 1211* (5th Cir.) (noting that "the compelling obligation of class counsel in class litigation is to the group which makes up the class."), cert. denied, *459 U.S. 828, 103 S. Ct. 63, 74 L. Ed. 2d 65 (1982)*; *Pettway v. American Cast Iron Pipe Co, 576 F.2d 1157, 1216 (5th Cir. 1978)*. In protecting the best interest of the class, counsel for the class may take actions that are contrary to the best interests or express desires of the class representative. *Id. at 1211*; *Maywalt v. Parker & Parsley Petroleum Co., 155 F.R.D. 494, 495 (S.D.N.Y. 1994)*, aff'd *67 F.3d 1072 (2d Cir. 1995)*.

We find that Hedlund acted consistent with these obligations. Because of the defendants' improper conduct, Hedlund was confronted with a settlement that was prejudicial to the remaining members of the class. Defendants refused to present this settlement to the court for review and approval and, in order to protect the interests of the class, Hedlund moved to set aside and vacate the release of Beale's claims. While these actions may arguable have been contrary to Beale's interests, we agree with the Magistrate judge that they are not a proper basis for disqualifying Hedlund. At bottom, Hedlund was acting in the best interest of the class. This court will not allow defendants to transform their unethical conduct into a basis for disqualifying Hedlund. At bottom, Hedlund was acting in the best interests of the class. This court will not allow defendants to transform their unethical conduct into a basis for sanctioning opposing counsel.

In conclusion, we find that, because there is not

sufficient evidence to indicate that the fair and efficient administration of justice has been compromised, defendants lack standing to seek disqualification of plaintiffs' counsel. But even if defendants had standing, we do not believe that Hedlund had a conflict of interests with the plaint iff class. For these reasons, defendants' Motion to Disqualify Reuben Hedlund and Hedlund, Hanley & John From Future Representation of the Plaintiff Class is denied.

III. Defendants' Motion for an Evidentiary Hearing

In connection with its objections to the Magistrate [*39] Judge's Report and Recommendation, defendants have filed a motion requesting that this court hold an evidentiary hearing. The purpose of this evidentiary hearing would be to elicit the opinion of experts on the issue of whether Gravelyn violated Illinois Rule of Professional Conduct 4.2 when he negotiated the settlement without the participation or consent of class counsel, Reube n Hedlund. At this hearing, defendants wish to call Professor Ronald Rotunda, a distinguished professor of legal ethics at the University of Illinois College of Law, who will opine that Gravelyn's negotiations with Carroll did not violate Rule 4.2. Defendants maintain that this hearing is necessary because of the importance of this issue to the legal profession generally and to this litigation specifically.

In opposition to plaintiffs' Objections to the Settlement and Motion for Sanctions, defendants submitted in writing Professor Rotunda's opinion to the Magistrate Judge. In response, plaintiffs submitted the written opinion of Roger C. Cramton, a Professor of Law at Cornell University Law School, who opines that Gravelyn violated Rule 4.2 by negotiating with Carroll without the participation or consent of [*40] Hedlund. These detailed and thoughtful written opinions are part of the record which this court reviewed in deciding the instant motions. We do not believe that an evidentiary hearing would add significant information beyond that provided in these comprehensive reports. For this reason, we conclude that an evidentiary hearing is not necessary for this court to decide the legal issues presented by the instant motions.

CONCLUSION

For all of the foregoing reasons, this court grants in part and denies in part plaintiffs' Objections to the Settlement and Motion for Sanctions. This court grants plaintiffs' objections that defendants violated *Fed. R. Civ. P. 23(e)* by failing to submit the settlement to this court for review and approval and v iolated Illinois Rule of Professional Conduct 4.2 by negotiating the settlement without the informed consent or participation of class counsel. This court also grants plaintiffs' request that defendants pay the fees and costs they have incurred as a result of the filing of the instant motions and that Gravelyn be disqualified from further representation in this case. This motion is denied to the extent it seeks to establish an escrow fund [*41] of $ 2.4 million which plaintiffs claim is the value of Beale's settlement, the production of the NASD letter, the payment of the ongoing costs of this litigation, and the disqualification of Warner, Norcross & Judd from further representation in this case.

This court denies in its entirety plaintiffs' Motion to Set Aside and Vacate the Release of Beale's Claims in This Action and the Related Circuit Court of Cook County Action. Likewise, defendants' Motion to Disqualify Reuben Hedlund and Hedlund, Hanley & John from Further Representation of the Plaintiff Class is denied.

It is so ordered.

Wayne R. Andersen

United States District Judge

Dated: September 11, 1998

LEXSEE 2005 U.S.DIST. LEXIS 28615

JASON MEVORAH, Petitioner, v. WELLS FARGO HOME MORTGAGE, INC., a division of WELLS FARGO BANK, NATIONAL ASSOCIATION, and DOES 1 through 50, inclusive, Defendants.

No. C 05-1175 MHP

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 28615

November 17, 2005, Decided
November 17, 2005, Filed

SUBSEQUENT HISTORY: Motion denied by, Sub nomine at *In re : Wells Fargo, 2007 U.S. Dist. LEXIS 60551 (N.D. Cal., Aug. 13, 2007)*

COUNSEL: [*1] For Jason Mevorah, individually, and on behalf of all others similarly situated, Plaintiff: James F. Clapp, J. Kirk Donnelly, Marita Lauinger, Dostart Clapp & Coveney, LLP, San Diego, CA; Arthur W. Lazear, Hoffman & Lazear, Oakland, CA; Mark R. Thierman, Thierman Law Firm P.C., Reno, NV.

For Wells Fargo Home Mortgage, Inc., a division of WELLS FARGO BANK, NATIONAL ASSOCIATION, Defendant: Baldwin J. Lee, Lindbergh Porter, Jr., Richard H. Rahm, Allen Matkins Leck Gamble & Mallory LLP, Three Embarcadero Center, San Francisco, CA.

JUDGES: MARILYN HALL PATEL, District Judge.

OPINION BY: MARILYN HALL PATEL

OPINION

MEMORANDUM & ORDER

Re: Motion to Correct

Plaintiff Jason Mevorah has brought the present action on behalf of all persons employed by defendant Wells Fargo Home Mortgage, Inc. as home mortgage consultants ("HMCs"), HMC trainees, and any similar positions responsible for originating home mortgage or personal loans to consumers within California from February 10, 2001 to the date of judgment after trial (the "class period"). Plaintiff alleges that defendant's characterization of HMCs as exempt from overtime is incorrect, and that he and other potential class members are entitled [*2] to overtime pay under the Fair Labor Standards Act ("FLSA") and California law. Now before the court is plaintiff's motion to correct alleged misrepresentations made by defendant. Having considered the parties' submissions and arguments, the court enters the following memorandum and order.

BACKGROUND

This action was filed in the San Francisco Superior Court on February 10, 2005, and removed to this court by defendant on March 22, 2005. Plaintiff seeks to certify a class pursuant to *Federal Rule of Civil Procedure 23*; however, no motions regarding certification have been filed and a class has not been certified. [1] Plaintiff worked as a HMC for defendant, where he was paid on a commission basis and classified as exempt from overtime. Joint CMS at 2. Plaintiff argues that he and other potential class members -- other HMCs, HMC trainees, and any similar positions responsible for originating home mortgage or personal loans to consumers within California during the class period -- are not exempt from the overtime requirements under the FLSA and California law. *Id.* Plaintiff seeks restitution for unpaid overtime wages, damages, and penalties, [*3] for himself and for the potential class members. *Id.*

1 The class certification hearing is currently set

for April 24, 2006. Defendant has asserted that if class certification is appropriate, it should be under *section 216(b)* of the Fair Labor Standards Act ("FLSA") rather than under *Federal Rule of Civil Procedure 23*. The court does not find it necessary to distinguish between certification of an "opt-out" class under *Rule 23* and an "opt-in" class under *section 216(b)* to decide the instant motion.

Plaintiff moves this court to issue a notice to all potential class members correcting certain alleged misrepresentations that defendant has made to prospective class members. Plaintiff alleges that defendant, through counsel, has contacted members of the potential class and has made false and misleading statements regarding this action and its potential impact. Pl.'s Motion at 10. Plaintiff further alleges that defendant has asked members of the potential class to sign [*4] declarations regarding the nature of their duties as HMCs and their compensation preferences, and that these declarations as drafted by defendant are inaccurate and omit critical facts. *Id.* In support of these allegations, plaintiff submitted the declaration of Caroline Urso, a former HMC. *See* Urso Decl. Ms. Urso states that in July 2005, while she was still employed by defendant, she was contacted by its counsel regarding this action. *Id.* P 3. She states that she was led to believe that if the action were successful HMCs would no longer be paid by commission, but instead would be paid on an hourly basis. Based on this representation, she states that she agreed to an interview to support the maintenance of her position on a commission basis. *Id.* She was informed that the interview would serve as the basis for declaration *See Id.* Ms. Urso further states that she was not informed by defendant's counsel that if the action were successful she might be eligible to recover overtime pay, that her declaration could be used against the interests of the potential class (including herself), that declining to be interviewed would not impact her job, or that she should seek [*5] the advice of counsel. *Id.* P 4. A few days after her conversation with counsel, Ms. Urso received a draft declaration which she declined to sign because she "felt that [counsel] had manipulated my words by leaving out significant statements and using only the words that benefitted his argument" and that it was not "the complete truth." *Id.* P 6.

Defendant filed its opposition to plaintiff's motion on October 17, 2005. Defendant admits that it contacted HMCs including Ms. Urso, but asserts that it did so as part of its own internal discovery to collect information about how the HMCs perform their jobs. Def.'s Opp. at 1, 6. Defendant asserts that it engaged in no misconduct in interviewing the HMCs. *Id.* at 11. Defendant maintains that it made no untrue statements about the potential impact of this action; its counsel did not tell Ms. Urso that the action sought to change the position from commissioned to hourly pay, but rather that it sought to change the position "to become eligible for overtime rather than the present exempt commission-based structure." *Id.* at 8. Defendant also states that the draft declaration prepared for Ms. Urso represented a fair and accurate [*6] representation of what she told counsel during their telephone interview. *Id.* In support of these assertions, defendant filed the declaration of Michael P. Wallock, an attorney who interviewed Ms. Urso and other HMCs. *See* Wallock Decl. Mr. Wallock attests to the above, and additionally states that he informed Ms. Urso that she was under no obligation to be interviewed by defendant's attorneys, and that there would be no reprisals should she decline. *Id.* P 3. Mr. Wallock also states that he emphasized, both in his conversation with Ms. Urso and in the cover memo accompanying the draft declaration he sent to Ms. Urso, that she should review the declaration for accuracy before signing it, and contact him to make any corrections. *Id.* P 4. He further states that "when an interviewee has asked to make changes or corrections to his or her declaration, we have always made them." *Id.* P 4.

On October 24, 2005 plaintiff replied to defendant's opposition, arguing that by obtaining declarations, which may be used as evidence in court, defendant has done far more than engage in internal discovery. Pl.'s Reply at 1. Plaintiff also raises two new arguments in its reply. First, [*7] plaintiff claims that defendant has violated *Federal Rule of Civil Procedure 26* by failing to reveal the existence of any declarations in its disclosures. [2] *Id.* Second, plaintiff claims that defendant has violated *California Rule of Professional Conduct 3-600* by failing to reveal to the HMCs it contacts, who are all potential class members, that "the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing" and that any information communicated to defendant may be "used in the organization's interest" if defendant "becomes adverse to the constituent." *Cal. R. Prof. Conduct 3-600*; *see* Pl.'s Reply at 1. On October 28, 2005, defendant filed a motion for leave to file a sur-reply. The court requested that defendant address *Rule 26* and *Rule of Professional Conduct 3-600* at oral argument, which took place on November 9, 2005.

2 The court will not address plaintiff's argument that defendant's failure to disclose the declarations under *Federal Rule of Civil Procedure 26* precludes their use "at trial, at a hearing, or on a motion" under *Federal Rule of Civil Procedure 37*. It is prematurely raised.

[*8] Plaintiff argues that the court should issue a notice to all potential class members advising them of several things: (1) that a class action has been filed seeking overtime compensation for HMCs; (2) that the dispute between plaintiff and defendant centers on

whether HMCs are "inside" sales employees entitled to overtime payment or "outside" sales employees exempt from overtime requirements; (3) that if plaintiff prevails, defendant can continue to pay its HMCs on a commission basis, but will be additionally required to make overtime payments; (4) that if plaintiff prevails, members of the class will be awarded back overtime pay; (5) that all potential class members have to right to speak, or to refuse to speak, to anyone, including defendant or its counsel, without fear of reprisal; (6) that if potential class members should choose to speak with defendant or its counsel, they have the right to refuse to sign any written statement, but if they do sign they should be sure it is complete and accurate; (7) that potential class members have the right to seek their own counsel; and (8) that potential class members may, but are not required to, contact plaintiff's counsel. Pl.'s Motion [*9] at 16-17, 19. Defendant, in opposition, argues that plaintiff's motion for a corrective notice should be denied because defendant's actions were proper under law. Def.'s Opp. at 9. The appropriate action, according to defendant, would be for plaintiff to depose the declarants of any declarations defendant should later submit to the court. *Id.*

LEGAL STANDARD

The United States Supreme Court has observed that

> [c]lass actions serve an important function in our system of civil justice. They present, however, opportunities for abuse as well as problems for courts and counsel in the management of cases. Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties. But this discretion is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules.

Gulf Oil Co. v. Bernard, 452 U.S. 89, 99-100, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981). The foundation for the court's duty and broad authority is found in *Rule 23(d) of the Federal Rules of Civil Procedure*, which provides, [*10] as relevant to the instant action, that the court may make appropriate orders "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given . . . to some or all of the members of any step in the action," and "imposing conditions on the representative parties." *Fed. R. Civ. Pro. 23(d).*

DISCUSSION

The motions currently before the court concern pre-certification communications by defendant to potential class members. Pre-certification communications to potential class members by both parties are generally permitted, and also considered to constitute constitutionally protected speech. *See e.g. Gulf Oil Co., 452 U.S. at 101*; *Parks v. Eastwood Ins. Services, Inc., 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002)*; *Atari, Inc. v. Superior Court of Santa Clara County, 166 Cal. App. 3d 867, 871, 212 Cal. Rptr. 773 (1985).* As such, any limitations on pre-certification 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 [*11] interference with the rights of the parties." *Gulf Oil Co., 452 U.S. at 101.*

Courts have limited pre-certification communications with potential class members after misleading, coercive, or improper communications were made. *See Parks, 235 F. Supp. 2d at 1084*; *Belt v. Emcare Inc., 299 F. Supp. 2d 664, 667 (E.D. Tex. 2003).* For example, this court has restricted a defendant's ability to communicate with potential class members following the defendant's publication of a notice that, in relevant part, failed to disclose the pendency or scope of the class action and may have caused confusion among potential class members regarding their rights. *See Pollar v. Judson Steel Corp., 1984 U.S. Dist. LEXIS 19765, Civil No. 82-6833 MHP, 1984 WL 161273 (N.D. Cal. Feb. 3, 1984)* (Patel, J.). Likewise, a district court in Texas has restricted a defendant's ability to communicate with potential class members where defendant sent a letter to potential class members that the court determined had "mischaracterized the suit [seeking overtime wages for nurse practitioners and physician's assistants] as an attack on the absent class members' status as professionals' in the workplace, [*12] " mischaracterized the damages, and was coercive because "the absent class member and the defendant are involved in an ongoing business relationship . . . as employer-employee." *See Belt, 299 F. Supp. 2d at 668.*

In the instant case, defendant, through its counsel, has contacted by telephone an unknown number of its employee HMCs who are potential class members. Defendant told these HMCs that the telephone calls were in connection with this action, which defendant described as seeking to have "HMC positions changed to become eligible for overtime rather than the present exempt commission-based structure," with the possible effects including "a system of time-monitoring, payment of overtime, as well as some lunch period regulation." Wallock Decl. P 5. For the HMCs who agreed to be interviewed, defendant has conducted telephone interviews and prepared declarations for the HMCs to sign. *See id.* PP 3-4.

These circumstances are not unlike those in the *Belt* case, where the court found the defendant's statements to improperly characterize the lawsuit "as an attack on the absent class members' status as professionals' in the workplace." *See Belt, 299 F. Supp. 2d at 667 n.4, 668.* [*13] Here, defendant's verbal explanation of this action as seeking to have "HMC positions changed to become eligible for overtime rather than the present exempt commission-based structure" with the possible effects including "a system of time-monitoring, payment of overtime, as well as some lunch period regulation" (*see* Wallock Decl. at P 5) could easily give a potential class member the mistaken impression that "if the lawsuit were successful, [HMC positions] would be paid on an hourly basis instead of by commission." Urso Decl. at P 3. Indeed, that is precisely the impression Ms. Urso states she was given. *See id.* The court therefore finds that defendant's statements to potential class members were misleading.

Defendant's statements also have a "heightened potential for coercion because where the absent class member and the defendant are involved in an ongoing business relationship, such as employer-employee, any communications are more likely to be coercive." *Belt, 299 F. Supp. 2d at 668*. Ms. Urso states that if she had not already been looking for another job she "would have felt forced to sign the declaration in order to continue her employment" with defendant. [*14] Defendant states that it told Ms. Urso and other HMCs it interviewed that they would "neither receive any benefit from participating in the interview nor receive any detriment by not participating." Def.'s Opp. at 7. Accepting defendant's version of the facts, it is still reasonable to assume that an employee would feel a strong obligation to cooperate with his or her employer in defending against a lawsuit.

Closely related to this problem is the conflict that a corporation's attorney must address when speaking to an unrepresented employee. *California Rule of Professional Conduct 3-600* provides that an attorney representing an organization shall, in dealing with that organization's employees, "explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing." Cal. R. Prof. Conduct 3-600(D). The rule further provides that the attorney shall not "mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if [the [*15] organization] is or becomes adverse to the constituent." *Id.*

When engaging in precertification communications, as is equally true with any communication, a member of the State Bar of California must comply with the requirements of the Rules of Professional Conduct. *See Parris v. Superior Court of Los Angeles County, 109 Cal. App. 4th 285, 298 n.6(2003, 135 Cal. Rptr. 2d 90)* (observing that counsel for plaintiff must abide by *rule 1-400*'s prohibitions on false, misleading and deceptive messages in pre-certification communications with prospective clients). It does not appear from the record currently before this court that defendant properly explained to the HMCs it contacted that "the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing" and that any information communicated to defendant may be "used in the organization's interest" if defendant "becomes adverse to the constituent." *Cal. R. Prof. Conduct 3-600.* Thus the court finds that defendant's pre-certification communications were misleading in at least one instance and, if this one employee was misled, it is reasonable to assume that other employees, who attorney Wallock [*16] acknowledges were similarly questioned, may have been misled. Moreover, this is a case that goes further than the employer disseminating information to its employees; it also involves the solicitation of signed declarations, thus committing employees who are potential class members to a set of facts that may be adverse to their interest and without their having been fully informed of all aspects of the case. [3] The opportunity for mischief is compounded by the relationship between the employer and the employee and the coerciveness an employee may feel. Employers and their attorneys need to be cautious about placing themselves in an untenable position.

3 It is questionable whether the soliciting and preparation of declarations is within the ambit of constitutionally protected speech, since this goes beyond the dissemination of information or mere communication.

Having determined that defendant's pre-certification communications with potential class members were misleading and improper, the court turns to [*17] the question of formulating an appropriate response. Plaintiff has asked the court to issue a corrective notice to all potential class members, but has explicitly declined to request that the court restrain defendant from further pre-certification contact with potential class members. *See* Pl.'s Motion at 16. Defendant believes that the appropriate response would be for plaintiff to depose the authors of any declarations defendant should later submit to the court. *See* Def.'s Opp. at 9.

In the interests of correcting any inaccurate impression left by defendant's misleading and improper pre-certification communications with potential class members, and of forestalling any future problems, the court finds and orders the following:

1. Neither party, including the parties'

counsel, may engage in any further pre-certification communications regarding this action with any potential class member unless pre-approved by this court. Communication undertaken in the regular course of business is excepted from this restriction. However, any communications touching upon matters involved in this litigation are impermissible absent a court order.

2. Defendant shall provide to plaintiff [*18] a complete list of all potential class members already contacted for interviews, regardless of whether the individual consented to an interview or provided a signed declaration. Plaintiff may depose each of these individuals for the limited purpose of determining the content of each individual's conversation with counsel for defendant and resulting declaration, if any.

3. The parties shall meet and confer and draft a notice to be distributed to potential class members which shall contain a brief summary of plaintiff's claims, defendant's defenses, and the potential outcome of the suit should plaintiff prevail. Within twenty (20) days of the date of this order the parties shall submit the proposed notice to the court for approval. Defendant shall bear the costs of distribution of the notice.

4. The parties also shall meet and confer about the preparation and distribution of a questionnaire designed to elicit facts about each individual's employment with defendant, including but not limited to dates of employment, job functions, hours worked, time spent on particular tasks, and manner of compensation. The parties shall reach agreement on the questionnaire if at all reasonably [*19] possible and submit it to the court for approval within forty-five (45) days of the date of this order. Defendant shall bear the costs of distribution of the questionnaire.

CONCLUSION

For the reasons stated above, the court DENIES plaintiff's motion to correct, but ORDERS the parties to comply with the foregoing on or before the dates ordered.

IT IS SO ORDERED

Date: November 17, 2005

MARILYN HALL PATEL

District Judge

United States District Court

Northern District of California

H

United States District Court,
N.D. Georgia,
Atlanta Division.
Willie ALLEN, individually and on behalf of all others similarly situated, Plaintiff,
v.
SUNTRUST BANKS, INC., Defendant.
Civil Action No. 1:06-CV-3075-RWS.

April 30, 2008.

Background: Employee brought collective action against employer under the Fair Labor Standards Act (FLSA), seeking unpaid wages, liquidated damages, costs, and attorney fees. plaintiffs moved for temporary restraining order (TRO) enjoining employer from contractually requiring any class plaintiff to dismiss their FLSA claims as a condition of obtaining any severance benefit.

Holding: The District Court, Richard W. Story, J., held that employees were entitled to TRO.

Motion granted.

West Headnotes

[1] Injunction 212 ⚷138.1

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.1 k. In General. Most Cited Cases

To obtain a preliminary injunction, a movant must demonstrate: (1) a substantial likelihood of success on the merits of the underlying case; (2) irreparable harm in the absence of an injunction; (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued; and (4) an injunction would not disserve the public interest.

[2] Injunction 212 ⚷150

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 k. Restraining Order Pending Hearing of Application. Most Cited Cases

Class of employees seeking temporary restraining order (TRO) enjoining employer from contractually requiring any employee to dismiss their FLSA claims as a condition of obtaining any severance benefit had substantial likelihood of success on the merits of their claim that employer violated the anti-discrimination provision of FLSA by conditioning the receipt of severance benefits on dismissal of their FLSA action seeking unpaid wages, liquidated damages, costs, and attorney fees; severance program was likely part and parcel of the employment relationship because it was contained within employer's employment manual and had been offered to the 178 employees impacted by the latest company-wide series of layoffs, and employer required employees to dismiss the FLSA action as a precursor for participation in the severance program. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

[3] Labor and Employment 231H ⚷788

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk787 Wages and Hours
231Hk788 k. In General. Most Cited Cases

An employer discriminates against an employee in violation of the FLSA when it conditions the award of a benefit that is part and parcel of the employment relationship on the basis of participation in an FLSA action, even if the employer would be free not to provide the benefit at all. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

[4] Labor and Employment 231H ⚷791

231H Labor and Employment

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549 F.Supp.2d 1379, 155 Lab.Cas. P 35,429, 44 Employee Benefits Cas. 1062
(Cite as: 549 F.Supp.2d 1379)

231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk787 Wages and Hours
231Hk791 k. Motive and Intent; Pretext. Most Cited Cases
The anti-discrimination provision of FLSA does not require a showing of intent. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3); Age Discrimination in Employment Act of 1967, § 4(d), 29 U.S.C.A. § 623(d).

[5] Labor and Employment 231H 791

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk787 Wages and Hours
231Hk791 k. Motive and Intent; Pretext. Most Cited Cases
Under the anti-discrimination provision of FLSA, good faith does not immunize a policy which discriminates on the basis of participation in an FLSA action. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).

[6] Injunction 212 150

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 k. Restraining Order Pending Hearing of Application. Most Cited Cases
Class of employees who had brought collective action against employer under the FLSA would likely suffer irreparable harm in the absence of temporary restraining order (TRO) enjoining employer from contractually requiring any employee to dismiss their FLSA claims as a condition of obtaining any severance benefit; employees could decline the severance benefit out of fear that agreeing to the terms of the Severance Agreement would require them to abandon their claims under the FLSA, or, should employees enter the Severance Agreement and continue their FLSA action, employer would imminently act to deny those individuals the severance benefit based on their participation in the action. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).
***1380**Alan Howard Garber, Marc N. Garber, The Garber Law Firm, P.C., Marietta, GA, Dan Getman, Getman Law Office, New Paltz, NY, Jason L. Gunter, Webb, Scarmozzino & Gunter, P.A., Fort Myers, FL, Ryan D. Barack, Kwall, Showers, Coleman & Barack, P.A., Clearwater, FL, for Plaintiff.

Glenn G. Patton, Alicia P. Starkman, Brett E. Coburn, Robert Steven Ensor, Alston & Bird, Atlanta, GA, for Defendant.

ORDER

RICHARD W. STORY, District Judge.

This case comes before the Court on Plaintiffs' Motion for Temporary Restraining Order [131]. After reviewing the entire record and with the benefit of oral argument, the Court enters the following Order.

Background

Plaintiff Willie Allen brought this action on behalf of himself and others similarly situated seeking unpaid wages, liquidated damages, costs, and attorneys' fees pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et. seq.* The Court has conditionally certified an opt-in class of current and former Client Technology Specialists who worked for SunTrust Bank between March 2004 and March 2007 without receiving time and one-half premium pay for hours worked in excess of forty hours per work week. (*See* Order of Mar. 5, 2007 [44] at 6.)

On April 28, 2008, Class Plaintiffs moved for injunctive relief, asserting that Defendant is presently discriminating and retaliating or imminently will discriminate or ***1381** retaliate against Class Plaintiffs in violation of 29 U.S.C. § 215(a)(3) by refusing to grant Class Plaintiffs benefits under an ERISA-administered severance plan unless Class Plaintiffs agree to voluntarily dismiss the instant lawsuit and waive their rights to refile another FLSA action. The facts pertinent to Plaintiffs' Motion are briefly recounted below.

A week prior to the filing of Plaintiffs' Motion, approximately 178 SunTrust employees were offered a severance package pursuant to SunTrust's Severance Policy after they were informed of their termination effective June 30, 2008. Depending on age, each employee has either 21 or 45 days within which to ac-

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cept Defendant's offer of severance. Of these 178 employees, approximately 21 are Class Plaintiffs in the instant action.

Paragraph 4 of the Severance Agreement, which is entitled "Release" and is applicable to all 178 employees, purports to require SunTrust employees to dismiss any pending action against SunTrust in exchange for severance benefits. It does not exclude participation in an action under the FLSA, such as the instant action. Thus, to be eligible for severance, employees must agree as follows:

> I agree to forever release SunTrust ... from any and all claims, charges, actions, arbitrations, demands, damages or expenses-past or present-I may have that arise or arose out of my employment with SunTrust.... *If I have already filed any Claim referred to in this paragraph, I agree to withdraw it prior to the date I receive my Severance Pay and never to refile it.* I understand that I am waiving and releasing all these claims on a knowing and voluntary basis.... I covenant not to hereafter sue or to authorize anyone else to file a lawsuit on my behalf against SunTrust and not to become a member of any class suing SunTrust asserting any claim release herein. I also covenant and agree not to accept, recover, or receive any back pay, damages, or any other form of relief which may arise out of or in connection with any administrative remedies pursued independently by any other person or any federal, state, or local governmental agency or class represented relating to any claim released herein.

(Ex. 4 to Pl.'s Motion for Temporary Restraining Order ¶ 4 (emphasis added).)

Plaintiffs contend that, by conditioning severance payments on the dismissal of their FLSA claims in this action, Defendant is presently or is imminently discriminating or retaliating against Plaintiff for filing an FLSA action, which violates 29 U.S.C. § 215(a)(3).

Having reviewed the record and having had the benefit of oral argument, the Court finds that Plaintiffs are entitled to relief for the reasons stated below.

Discussion

[1] It is settled law in this Circuit that a preliminary injunction is an "extraordinary and drastic remedy." Zardui-Quintana v. Richard, 768 F.2d 1213, 1216 (11th Cir.1985). To obtain such relief, a movant must demonstrate:

> (1) a substantial likelihood of success on the merits of the underlying case, (2) ... irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest.

Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1246-47 (11th Cir.2002).

***1382A. Substantial Likelihood of Success**

[2][3][4][5] As to the first prong, the Court concludes that Plaintiffs have met their burden of demonstrating a substantial likelihood of success on the merits. Under 29 U.S.C. § 215(a)(3), it is unlawful for an employer to in "any ... manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding" under the FLSA. An employer discriminates against an employee in violation of 29 U.S.C. § 215(a)(3), among other ways, when it conditions the award of a benefit "that is part and parcel of the employment relationship" on the basis of participation in an FLSA action, "even if the employer would be free ... not to provide the benefit at all." *See, e.g., EEOC v. Bd. of Governors of State Colleges and Univs.*, 957 F.2d 424, 428-30 (7th Cir.1992) (analogous ADEA context); *see also* *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (analogous Title VII context). Like the anti-discrimination provisions of the Age Discrimination in Employment Act, the anti-discrimination provision of FLSA does not require a showing of intent. 29 U.S.C. § 623(d). Rather, it "is concerned with the *effect* of discrimination against employees who pursue their federal rights, not the motivation of the employer who discriminates." *Bd. of Governors of State Colleges and Univs.*, 957 F.2d at 428. Thus, good faith does not immunize a policy which discriminates on the basis of participation in an FLSA action. *Id.* at 428.

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Based on the evidence of record and admissions by defense counsel, the Court finds as an initial matter that Class Plaintiffs will likely demonstrate that the Severance Program is "part and parcel of the employment relationship" because it is contained within SunTrust's employment manual and has been offered, according to defense counsel at oral argument, to the 178 employees impacted by the latest company-wide series of layoffs, to a total of 350 employees in 2008 alone, and to approximately 2100 former employees in the company's history. Having made the severance package available to all employees both in practice and in writing in connection with the SunTrust employment manual, such a "term, condition, or privilege" of employment cannot, consistent with 29 U.S.C. § 215(a)(3), be doled out in a discriminatory fashion, *i.e.,* based upon whether or not an employee is participating in an FLSA action. *See* Hishon, 467 U.S. at 76, 104 S.Ct. 2229 (Title VII analogue); *see also* *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.,* 821 F.2d 1085 (5th Cir.1987).

But as the record evidence demonstrates, it appears that the severance package is or will imminently be doled out depending on whether individuals are participating in the instant FLSA action. Paragraph 4 of the Severance Agreement-on its face and by admission of defense counsel-requires Class Plaintiffs to dismiss the instant action as a precursor for participation in the severance program. Indeed, defense counsel stated at oral argument that an individual Class Plaintiff's failure to dismiss the instant FLSA action would render that individual ineligible for the severance benefit. On these facts, it cannot be questioned that Plaintiffs' continuing participation in this FLSA action is a "determining factor" in eligibility for SunTrust's severance program. Thus, regardless of whether Paragraph 4 specifically and intentionally targets those who have initiated FLSA actions, Plaintiffs have demonstrated a likelihood of success in showing a violation of 29 U.S.C. § 215(a)(3) because paragraph 4 of the Severance Agreement has the *effect* of discriminating against Class Plaintiffs on the ***1383** basis of their participation in this FLSA action.[FN1]

FN1. Although Defendant cites *EEOC v. SunDance,* 466 F.3d 490 (6th Cir.2006), *SunDance* is distinguishable from the instant action because, unlike the agreement in *SunDance,* the Severance Agreement in this action requires Plaintiffs to immediately dismiss their FLSA claims in order be eligible for the severance package. In *SunDance,* the Sixth Circuit held that the "mere offer" of a severance agreement which contained only a restriction on filing charges with the EEOC (but did not contain a requirement to dismiss presently filed charges) did not rise to the level of retaliation because "the employees of SunDance have not been deprived of anything" and those who chose to accept it "are better off" in part because they can "accept the agreement and argue later that parts of it may be unenforceable...." *Id.* at 501. In this case, however, Class Plaintiffs must immediately dismiss the instant FLSA action in order to be eligible for the severance package; they do not have the option of both accepting severance benefits and pursuing their already-filed FLSA claims. Moreover, unlike in the *SunDance* case, Plaintiffs here have demonstrated that the severance agreement is likely "part and parcel" of the employment relationship because of its presence in the employee handbook and because of SunTrust's company-wide practice of offering it to terminated employees.

B. Irreparable Harm

[6] As to the second prong, the Court concludes that Plaintiffs would likely suffer irreparable harm in the absence of injunctive relief. As Plaintiffs' evidence makes clear, Class Plaintiffs in this action may well decline the severance benefit out of fear that agreeing to the terms of the Severance Agreement will require them to dismiss the instant action and abandon their claims under the FLSA. Alternatively, should Plaintiffs enter the Severance Agreement and continue this action, Defendant will imminently act to deny those individuals the severance benefit based on their participation in this action. In either case, Class Plaintiffs will suffer irreparable harm in the absence of injunctive relief.

C. Balancing of Harms and Public Interest

Finally, the Court concludes that Plaintiffs have demonstrated the third and fourth prongs of the preliminary injunction inquiry. The harm suffered by Plaintiffs will exceed any harm to Defendant if the

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injunction issues, and the Court finds that enjoining a violation of 29 U.S.C. § 215(a)(3) does not disserve the public interest.

D. Conclusion

For these reasons, Plaintiffs' Motion for a Temporary Restraining Order is **GRANTED.** Defendant is hereby **ENJOINED** from (1) considering the participation of any Class Plaintiff in the instant action as a factor concerning eligibility in its Severance Program and (2) contractually requiring any Class Plaintiff to dismiss the instant action as a condition of obtaining any severance benefit. To correct any potential confusion caused by Defendant's prior circulation of the proposed Severance Agreement, Defendant is hereby **ORDERED** to issue a written statement to all Class Plaintiffs stating that their participation in this lawsuit will not affect their eligibility for a severance benefit and that no individual employee is required to dismiss or otherwise withdraw from this action in order to participate in the Severance Program.

After the passage of ten (10) days, this temporary restraining order shall **CONVERT** into a preliminary injunction, unless Defendant objects and requests in ***1384** writing an additional hearing on the issues raised herein.

Conclusion

For the foregoing reasons, Plaintiffs' Motion for a Temporary Restraining Order is **GRANTED.** Defendant is hereby **ENJOINED** from (1) considering the participation of any Class Plaintiff in the instant action as a factor concerning eligibility in its Severance Program and (2) contractually requiring any Class Plaintiff to dismiss the instant action as a condition of obtaining any severance benefit. To correct any potential confusion caused by Defendant's prior circulation of the proposed Severance Agreement, Defendant is hereby **ORDERED** to issue a written statement to all Class Plaintiffs stating that their participation in this lawsuit will not affect their eligibility for a severance benefit and that no individual employee is required to dismiss or otherwise withdraw from this action in order to participate in the Severance Program.

After the passage of ten (10) days, this temporary restraining order shall **CONVERT** into a preliminary injunction, unless Defendant objects and requests in writing an additional hearing on the issues raised herein. Should Defendant do so, the Court will schedule a hearing on a preliminary injunction.

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