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

MINUTE ORDER

DATE: 06/01/2018 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: Steven H Rodda
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2017-00222101-CU-OE-GDS** CASE INIT.DATE: 11/13/2017
CASE TITLE: **Cress vs. Mitsubishi Chemical Carbon Fiber and Composites, Inc**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion - Other - Civil Law and Motion

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Motion to Invalidate Releases and for Curative Action) taken under submission on 5/30/2018

TENTATIVE RULING

Plaintiffs Henry Cress and Jeanine Roberts motion to invalidate releases and for curative action is granted as set forth below.

In this putative wage and hour class action, Plaintiffs allege causes of action against Defendant Mitsubishi Chemical Fiber and Composites, Inc. ("MCCFC") for violations of the Labor Code, violation of Business & Professions Code § 17200 and also seek penalties under the Private Attorneys General Act ("PAGA"). As seen from the Court's ruling in item 11 on today's calendar, they have also been given leave to amend to allege a cause of action for failure to pay overtime wages in violation of the Fair Labor Standards Act ("FLSA").

By way of this motion, Plaintiffs seek to have the Court find that any settlement between MCCFC and its current or former employees are invalid. They also seek an order that MCCFC be required to issue a curative notice that specifically advises potential class members of the instant action, advises them that the settlement agreements are invalid and does not prevent them from participating in this action.

Plaintiffs argue that MCCFC provided employees with a cover letter and settlement agreement that fail to specifically identify Plaintiffs, Plaintiffs' counsel, indicate that a lawsuit has been filed, provide the case number for the instant lawsuit or any information that would allow employees to identify the lawsuit or get in touch with Plaintiffs' counsel for information regarding the claims alleged or the status of the case. Plaintiffs also argue that the cover letter provides confusing and misleading information regarding the instant dispute because, for example, it states that MCCFC "disagrees with the former employees' claims that they were not properly compensated for incentive bonus payments." Plaintiffs claim this is misleading because the instant lawsuit concerns improper overtime payments not improper bonus payments.

Courts have inherent powers of "fundamental inherent equity, supervisory, and administrative powers,

as well as inherent power to control litigation." (*Slesinger, Inc. v. Walt Disney Co*. (2007) 155 Cal.App.4th 736, 758.) The United States Supreme Court has made clear that in the class action context, because of the history of abuse, a 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." (*Gulf Oil Co. v. Bernard* (1981) 452 U.S. 89, 100.)

In moving to invalidate any releases and/or settlement agreements MCCFC entered into with putative class members and for a curative notice, Plaintiffs rely heavily on federal cases in this area. MCCFC argues that the instant action is not based on federal law and that the federal cases have no application. MCCFC is incorrect. In the class action context, California Courts may properly look to federal cases in the absence of controlling California authority. "*Gulf Oil* construes and applies the federal class action rule (rule 23, Fed. Rules Civ. Proc., 28 U.S.C.) and may properly be considered in the absence of controlling California authority." (*Atari, Inc. v. Superior Court* (1985) 166 Cal.App.3d 867, 872.) There is no controlling California authority contrary to anything discussed in the federal cases discussed herein. To that end, the federal cases cited in Plaintiffs' moving papers dealing with the multiple scenarios in which courts have invalidated releases obtained from putative class members and required curative action are particularly relevant.

In the class action context, misleading communications "pose a serious threat to the fairness of the litigation process, the adequacy of representation, and the administration of justice generally. (*Cheverez v. Plains All Am. Pipeline, LP* (C.D.Cal. 2016) 2016 U.S.Dist.LEXIS 27818 at *4-6.) The "court's responsibility to monitor communications is heightened where potential class members are unrepresented by their own counsel." (*Id*. at *6.) "Accordingly, a court may 'take action to cure the mis-communication and to prevent similar problems in the future' where 'potential class members have received inaccurate, confusing or misleading communications.'" (*Id*.)

First, there is no dispute that MCCFC has the ability to contact putative class members and attempt to seek settlements, to the extent that it seeks to do so, it must not utilize misleading communications. Courts have granted motions seeking corrective action in the form of sending curative notices and invalidating settlement releases obtained from putative class members premised on misleading communications. (E.g., *Slavkov v. Fast Water Heater Partners* (N.D.Cal. 2015) 2015 U.S.Dist.LEXIS 149013.)

There are numerous cases where courts have invalidated releases/settlements obtained from putative class members obtained through communications which were found to be misleading or which did not contain relevant information regarding the pending class action. For example, courts have found releases misleading where it failed to notify putative class members of a pending class action. (*Cheverez*, *supra*, 2016 U.S.Dist.LEXIS at *12 ["[u]se of [a] general receipt and release...by [a] Defendant in regards to putative class members, without notification of the pending putative class action, is misleading as a matter of law" [citation omitted].) Courts have invalidated releases which precluded participation in the class action and only provided notice of the case name and an explanation that it was a putative class action. (*County of Santa Clara v. Astra USA, Inc*. (N.D.Cal. July 8, 2010) 2010 U.S.Dist.LEXIS 78312 at *4 [defendant's release "should not have concealed material information," and "at a minimum should have explained....how closely [defendant's settlement] calculations aligned with plaintiff's allegations"].) There, the court found the defendant "was required to provide enough information so that recipients would not be misled about the strength or extent of the [class] claims." (*Id*.) Requests for opt-outs in a class action were found to be misleading where they "omitted key information, such as contact information for plaintiffs' counsel and a full description of the claims or the complaint." (*Camp v. Alexander* (N.D.Cal. April 15, 2004) 300 F.R.D. 617, 625.) Defendants seeking to obtain settlements from putative class members "have an obligation not to conceal the difference between participating in the class action and accepting short-term payment through the claims process." (*Cheverez*, *supra*, at *13-14.)

Releases have been invalidated where the settlement offer did not identify the case name and number, claims brought by the plaintiff, class counsel's contact information, the court in which the case was filed or any other way for the putative class member to learn about the case. (*Retiree Support Grp. Of Contra Costa Cnty. v. Contra Costa Cnty.* (N.D.Cal. 2016) 2016 U.S.Dist.LEXIS 99720, at *20.) Similarly, releases were invalidated where it did not include a copy of the plaintiff's complaint, information as to when the complaint was filed, a description of the case, or the contact information for class counsel. (*Gonzalez v. Preferred Freezer Servs. LBF LLC* (C.D.Cal. 2012) 2012 U.S.Dist.LEXIS 139764, *3-4.) While a putative class member may have been able to discover information of the lawsuit through internet research, "evidence that the putative class members may have learned about the lawsuit in other ways does not mitigate the misleading nature of the communication." (*Marino v. CACafe, Inc*. (N.D.Cal. 2017) 2017 U.S.Dist.LEXIS 64947, at *6.) Communications have also been found to be misleading where the release's language was unclear or incorrect. (*Johnson v. Serenity Transp. Inc.* (N.D.Cal.2017) 2017 U.S.Dist.LEXIS 156804, at *19-20 [release incorrectly defines the scope of the class, did not indicate that settlement of FLSA claims required court approval, and improperly included language that the employee agree to opt out of the pending litigation and not participate because it improperly suggested that the employee was prohibited from participating as a witness or otherwise, not just not being a class member].)

Moreover, courts are particularly aware of unsupervised communications between employers and employees. "[I]n the context of class action litigation, whether pre- or post-certification, unsupervised communications between an employers and its workers present an acute risk of coercion and abuse." (*Marino, supra,* 2017 U.S.Dist.LEXIS 64947, at *5.) "The case law nearly universally observes that employer-employee contact is particularly prone to coercion." (*Camp*, *supra*, 300 F.R.D. at 624.)

Here, Plaintiffs argue that the subject settlement agreement and cover letter contains misleading statements, material omissions, and other defects which require that the settlements be invalidated. On this point the Court must agree. First, neither the settlement agreement nor the cover letter mentioned the existence of this pending action or that the employees were putative class members in a pending class action. (Rodriguez Decl. Exhs. C, D.) Neither the cover letter nor the settlement identify Plaintiffs and instead refers to "former employees." A copy of the complaint was not included with the cover letter and settlement agreement. Moreover, the cover letter and settlement fail to fully and accurately describe Plaintiffs' claims in this action. To that end, the documents characterize a dispute with respect to improper payment of bonuses and untimely payment of bonuses while the instant lawsuit focuses on a failure to pay all overtime due. At a minimum the description is misleading. Further, Plaintiffs' counsel was not identified and no contact information was provided. The settlement agreement did not indicate that FLSA and PAGA settlements require court approval. (Id. Exh. C.) These omissions alone easily justify this Court issuing an order invalidating any releases obtained by MCCFC under the extensive authority cited above. But there are additional issues.

Indeed, it is not just that the cover letter and settlement agreement did not identify the existence of the instant lawsuit, but it suggested that one was not pending. To that end the release purports to apply to "any potential wage claim you may have" and the employee agrees to not participate "in any individual action or class or collective action that may be brought" and agrees to opt-out and not participate "[i]f a class action proceeding is initiated" against MCCFC. (Id. Exh.C ¶ 3.) MCCFC indicated that it was providing the settlement offer "in an abundance of caution, and in order to resolve any lingering issues between the parties." (Id. Exh. C.) These statements suggest to a reader that no action is pending. This of course is not true. Further the requirement that the employee agree to opt out and not participate if a class action is initiated suggest that the employee cannot even participate as a witness or otherwise. Cases have found almost identical language to be misleading. (*Johnson, supra,* 2017 U.S.Dist.LEXIS 156804, at *20; *Slavkov, supra,* 2015 U.S.Dist.LEXIS 149013, at *11-14.) Further the cover letter indicates that the settlement was offered to avoid "protracted litigation" which was misleading

as the parties were heading towards mediation at the end of that month.

In opposition, MCCFC argues that there were no misleading of confusing communications. Again, it argues that the federal cases are inapplicable which the Court has already rejected. It argues that California courts place no prohibitions whatsoever on a Defendant's pre-certification communications with potential class members. This is an incorrect statement of law. Taken to its logical extreme, MCCFC's position would mean that a defendant employer in a class action context could attempt to obtain settlements from putative class member employees not only through misleading communications but ones which were outright false. The federal cases above, which are properly relied upon here, plainly dictate a different result as does the Court's own inherent power to control the litigation before it. In any event, the lone case cited by MCCFC on this point actually supports Plaintiffs. (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 297-300.) There the general proposition that "parties are free to communicate with potential class member before class certification" was recognized and that class counsel did not need prior approval to send a written notice to putative class members prior to certification which provided basic information about the lawsuit and that class counsel wanted to gather information. There was, however, no contention that the communication was misleading. *Parris* did not involve the issue of where a defendant employer obtained settlements from putative class members based upon communications contended to be misleading and is of no assistance to MCCFC. *Parris* simply recognizes the ability of the parties to contact class members pre-certification but even *Parris* recognized that limits could be placed in the event there was evidence of abuse. (*Id*., 297-298, 300.) There is no dispute that MCCFC was entitled to contact putative class members and even attempt to obtain a settlement. It was not, however, permitted to do so through misleading communications.

MCCFC argues that there was nothing misleading in the cover letter or the settlement. To that end, however, it simply argues that while the case number of this action was not listed, Plaintiffs admitted that one class member was able to discover information through internet research. Further, while MCCFC argues that if you type in the parties' names, you can get all the information about the lawsuit, the cover letter and settlement do not identify Plaintiffs' names. In any event, as already stated above, that a potential class member may have been able to obtain information about the action does not change the result. Once again, "evidence that the putative class members may have learned about the lawsuit in other ways does not mitigate the misleading nature of the communication." (*Marino v. CACafe, Inc*. (N.D.Cal. 2017) 2017 U.S.Dist.LEXIS 64947, at *6.) Moreover, the fact that MCCFC indicates that the cover letter advised employees to seek independent counsel and could ask the director of Human Resources any questions the employee may have also does not mitigate against any misleading information. The fact that no employee has complained to MCCFC and expressed remorse about the settlement is not relevant. Again, "[t]he case law nearly universally observes that employer-employee contact is particularly prone to coercion." (*Camp*, *supra*, 300 F.R.D. at 624.) Moreover, MCCFC makes no attempt to counter Plaintiffs' assertions regarding the requirements that the employee agree not to participate in the action, that no contact information for Plaintiffs' counsel was provided, or that the documents implied that no action was pending, failed to inform employees that settlement of FLSA and PAGA claims require Court approval, or that the settlement implied that the employees could not even participate as witnesses. The cover letter and settlement are misleading.

As a result, the cover letter and settlement agreement at issue are misleading for the numerous reasons set forth above. Given the misleading nature of the communications, the Court may properly order that a curative notice be sent to the recipients of the communications in addition to invalidating any releases premised on the communications.

Given the above, the Court need not, and does not need to reach Plaintiffs' alternate arguments that the releases can also be invalidated on the grounds that payment for unpaid wages concededly due cannot be waived under Labor Code § 206.5 or MCCFC's counter arguments that there was a bona fide dispute as to wages. In addition, the Court need not address Plaintiffs' argument that the agreements can also

be invalidated on the basis that they attempt to waive non-waiveable FLSA and PAGA claims without Court approval such that they are unconscionable.. The Court has found that the communications were misleading and invalidates them on that basis.

As a result, the motion is granted to the extent that the Court finds that any settlement agreement between MCCFC and any putative class member is invalid. (E.g, *Slavkov, supra,* 2015 U.S.Dist.LEXIS 149013 at *21.) In addition, a curative notice shall be sent to all putative class members that received MCCFC's communications, notifying them that any release is invalid, and correcting the communications consistent with the reasoning set forth above. (*Id*. at *22.) The parties are directed to meet and confer on the content of the notice and the manner in which it will be distributed (e.g., third-party administrator or directly from the parties). The parties shall bear the cost of the notice equally.

MCCFC's evidentiary objections are overruled. The Court does note, however, that with respect to Plaintiffs' counsel's statements regarding being contacted by an unidentified employees and being told that employees were called into HR over the radio, given the cover letter and settlement, and told that MCCFC would likely find a way to get rid of people who did not sign, the Court did not consider the statements for the truth of the matter asserted and it was not relevant to the resolution of the issues set forth above. The Court's ruling here was based solely on the content of MCCFC's communications themselves.

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

COURT RULING

The matter was argued and submitted.

The matter was taken under submission.

Having taken the matter under submission, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirmed the tentative ruling.

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