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BALL JANIK LLP

IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF JACKSON

JOSEPH BOVA,

Plaintiff,

vs.

CITY OF MEDFORD, an incorporated
Subdivision of the State of Oregon, and
MICHAEL DYAL, City Manager of the
City of Medford, as an Individual, and in His
Official Capacity.

Defendants.

Case No. 08-1663-E7

PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO MOTION
FOR PROTECTIVE ORDER

INTRODUCTION

Plaintiff claims Mr. Detling, while acting in his official capacity for defendant the City of Medford ("the City), infringed on this court's sole authority to communicate, and to define the content of any such communication, with class action members. Mr. Detling's infringement has nothing to do with his earlier deposition testimony as the City suggests. However, his previous sworn statements provide direct evidence Mr. Detling was, and is, participating in the City's strategic decisions concerning this lawsuit along with other proposed deponents Robert Calkins, City attorney John Huttel, and Mayor Michael Dyal. Therefore, the gravity of Mr. Detling's contact with individual class members reveals intentional indifference by the City to this court's authority and prerogative concerning communication with class members.

The core issue in this case at this juncture is the City's on-going strategy of disseminating the false information to class members and the general public that its compliance with ORS 243.303(2) will necessarily cost class members \$220 per month out-of-pocket. The City has been harping on this information since the filing of its Written Plan in January 2009. The City's Plan amounts to an ultimatum by the City that all costs stemming from its compliance with ORS 243.303(2) must be borne by class members. This ultimatum is a direct challenge to this court's Limited Judgment because no where has either the court or the plaintiff suggested that the City's compliance with ORS 243.303(2) was to be at the expense of class members whom the court designated as beneficiaries of this litigation.

A current manifestation of the City's strategy is their present motion for a protective order denying plaintiff the opportunity to conduct discovery of the City's communications with members of the class without court approval. Representatives of the City have apparently communicated to members of the class that enforcement of this court's Limited Judgment will result in class members paying an additional \$220 a month for health insurance. Representatives of the City have apparently informed members of the class that the City will pay for the cost of legal representation so that class members will not have to pay \$220 a month to maintain their health insurance coverage. Plaintiff maintains the City has no basis to make these claims, knows there is no such basis and therefore must defend against any discovery efforts to avoid exposure of its strategy as being nothing more than a fiction.

The City's reasons for moving for a protective order are weak. The City argues that mssrs. Detling, Huttli, Calkins and Dyal have been noticed for deposition because plaintiff wants more information about the basis for the City's liability in this case, and that because the proposed

deponents have already been deposed on this issue, their examinations are unnecessary.

The City is wrong.

Plaintiff noticed the proposed deponents because they are the key individuals who make decisions on behalf of the City concerning the defense of this litigation. In their roles it would only be them who have information about the basis for the City's claim that compliance with the Limited Judgment will come at the cost of the \$200 per month out-of-pocket to class members.¹ As the City has made this position a matter of public knowledge due to Mr. Detling's appearance at a Medford City Council meeting, it is imminently appropriate plaintiff be allowed to discover the basis of the City's claims. Liability in this case has already been decided by the court. Plaintiff is therefore no longer concerned about the basis of its claim; what Plaintiff is concerned about is the City's apparent attempt to exert economic pressure on members of the class to undermine this court's decisions in this case.

The City next argues that Mr. Huttl should not be made to testify because "any information he has on the merits is protected by the attorney-client privilege." Motion at 2. This reason is also baseless because, again, plaintiff is not interested in the merits of his claim, but instead in any role Mr. Huttl played in the decision to have Mr. Detling appear before the Medford City Council. It is telling, however, that counsel for the City suggests Mr. Detling's City Council statements involved Mr. Huttl's rights as a class member only, that what Mr. Huttl wants to do is to

¹ The City has suggested that plaintiffs deposition notice places plaintiff in adversarial position with all class members. Motion at 2, lines 7-16. However, plaintiff's deposition notice makes it clear that he only wishes to depose the listed individuals who are the City representatives who make decisions related to health insurance and who are involved in disseminating false information to the class.

communicate to the Oregon Court of Appeals that he wants the “status quo” portion of the Petition to be published to the Court of Appeals. However, Mr. Huttl is the City Attorney and provides legal advice to the City Council in this capacity. In his role he can not ethically participate in facilitating communication between the City and members of the plaintiff class. Plaintiff is entitled to depose Mr. Huttl precisely because he was present at a public meeting where communications occurred between class members which concerned the subject matter of the lawsuit. During these exchanges Mr. Huttl apparently took no action to inform the City that communications with the class should first be approved by the court.

Lastly, the City claims Lisa Umscheid now represents Mr. Detling and Mr. Calkins. This is true but is not helpful to the court or plaintiff because Ms. Umscheid has yet to seek this court’s approval to file an appearance with this court. Thus, the class counsel are under no obligation to consult with Ms. Umscheid concerning the date of deposition. If Mr. Detling and Mr. Calkins want an attorney, whether Ms. Umscheid or someone else, to represent them in their personal capacity, class counsel have no objection to Ms. Umscheid appearing at the deposition on their behalf or making requests on their behalf for alternate dates. Mr. Detling and Mr. Calkins representation by another attorney is not, as the City suggests, a basis for a protective order against taking the depositions.

The reasons why the City believes the noticed deponents should not be made to appear are simply false. Plaintiff therefore concludes the City’s motion is neither made in good faith, as it pleads, but is made for the purpose of delay and is not well founded. Accordingly, the City’s motion should be denied.

POINTS AND AUTHORITIES

A. Procedural. The City neglects to designate the procedural basis of its motion. Plaintiff assumes the City intends implication of ORCP 36 C. However, plaintiff requests the permission of this court to amend this Response in the event the City reveals an alternative.

B. Legal Standard.

Under ORCP 32E, this court has authority over the conduct of class actions. Under ORCP 32E(2) and (3), the court may make appropriate orders for the protection of class members including imposing conditions on parties, class members and intervenors.

While there is little state court authority on point, it is well settled in federal court that "[b]ecause of the potential for 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 the parties." *Gulf Oil Company v Bernard*, 452 US 89, 101 S Ct 2193, 68 LEd2d 693 (1981). If class members and the class opponent are involved in a on-going business relationship, communications from the class opponent to the class may be coercive. As a result, the court may, consistently with the First Amendment, tailor limitations on communications with the class. *Kleiner v First Nat. Bank of Atlanta*, 751 F2d 1193, 1206 (11 th Cir 1985). One form of prohibited communication is "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential court orders therein.". *Waldo v Lakeshore Estates, Inc.*, 433 F Supp 782, 786 (ED La. 1977).

C. Facts. On or about May 25, 2010 Plaintiff learned Douglas Detling, a senior administrative official of City government, appeared before a Medford City Council meeting. At the meeting, Mr. Detling declared the intention of a sizable number of City management

employees, members of the class action in this case, to seek legal representation apart from the present attorneys of the Class. Further, plaintiff learned Mr. Detling also asked the City to assume the cost of \$20,000 to pay the legal fees for a majority of the class members. Mr. Detling also stated the class members want representation separate from court appointed counsel because class counsel has not acknowledged the class members' support of the motion to vacate the Limited Judgment now before the Oregon Court of Appeals. The controlling reason for the class members' conduct is their fear that this litigation will result in their having to pay up to \$200 more a month to maintain their health care insurance.

Mr. Detling's appearance and his statements described above were reported in the *Medford Mail Tribune*. The article does not state Mr. Detling informed the City Council that this court never authorized the City to seek compliance with ORS 243.303(2) by charging the cost of compliance to its employees. Fisher Aff. Ex. 1.

The *Mail Tribune* states that Douglas Detling declared before the City Council, "Ninety percent of the management employees don't want to be part of the class-action lawsuit," and that he based his declaration on a "petition sent out to the 105 employees in this category working for the City." The so called petition contains the signatures of the referred to 105 employees, who placed their names below the following heading:

"We, the undersigned members of the management group of the City of Medford, who are not represented by a collective bargaining agreement, have medical insurance through the City, recognize that retirees from the group only have the ability to purchase the same health insurance after employment ends for 18 months, and wish to have the status quo unchanged. We respectfully ask that the injunction be terminated."

Fisher Aff., Ex. 2, Petition.

The "Petition" raises several concerns which justify the conduct of discovery in this case.

First, the Petition raises several questions on its face. Secondly, Resolution 2010-117 likewise implies suspicious circumstances relative to Mr. Detling's appearance before the City Council, which again justifies the taking the depositions of Mr. Detling, Mr. Dyal, Mr. Calkins and Mr. Huttl. These concerns are discussed below.

D. The Petition. There is no claim of authorship of the Petition. Plaintiff has not been provided any information about who took it upon themselves to draft the Petition's language or caused it to be circulated for signature among the class members. The City's counsel only states "The management employees as a group got together, without any communication from me, and organized themselves in order to protect their own interest." Franz Aff. In Support of Reply to Plaintiff's Objection to Defendants' Submission in Opposition to All Plaintiff's Motions Concerning Notice to Class, p. 2. Hence, Plaintiff needs to conduct discovery concerning, but not limited to, the following issues:

- a. Who initiated the Petition and/or who wrote it and why?;
- b. Who contacted Lisa Umsheid prior to Detling's appearance before the Medford City Council, and why Ms. Umsheid in favor of a Medford attorney?
- c. Which employees, members of the class, approached the City Council, explained their interests were not being represented by the attorneys for the class, that they wish to maintain the status quo of health care benefits coverage with OTET, and that they have asked for financial assistance to retain independent counsel to represent their interests (*per* Resolution 2010-117, Fisher Aff. Ex. 3.

- d. How was the Petition circulated throughout the City's management staff who are members of the class, including:
- Who(m) placed the Petition before 105 City management employees?;
 - Did the distributor of the Petition speak with individuals alone or were they in groups?
 - Did the distributor of the Petition speak with individuals within the City workplace, during the employees' or the distributors' work hours?
 - Was the Petition typed on City computers?
 - Was the Petition copied on City copiers?
 - Who authorized the distribution of the Petition in the workplace during work hours?
 - Were arrangements made to reimburse the City for any use of City equipment, resources to lost work time?
 - If arrangements were made to reimburse the City, when were these arrangements made?
 - On what information did the distributor base his Petition's statement that class member will have to pay an additional \$200 a month in insurance premiums unless they can block the lawsuit?
 - Were class members were given copies of the completed Petition?:
 - Which members refused to sign the Petition for any reason?
 - Ms. Umsheid states she now represents 70+ class members. Who are the 35 class members who signed the Petition but did not have Ms. Umsheid

assume legal representation? Fisher Aff. Ex. 5; and

– Was the fact of Ms. Umsheid having already been asked to represent the class members disclosed to the members when they were requested to sign; and the Petition?

E. Mr. Detling. Plaintiff believes Mr. Detling was the person who circulated the Petition. He is one of the individual's noticed for deposition. This is a logical conclusion given the *Mail Tribune's* report that, "Detling himself said he decided to remain a participant in the suit for tactical reasons, to keep track of the legal maneuvering on the part of Brischetto." Fisher Aff. Ex. 1 at p. 2. He is a legitimate fact witness who warrants examination by deposition responsive to the above defined issues.

F. Mr. Calkins. Mr. Calkins likewise needs to be deposed because it is to him that calculation of the extra \$200 payment by class members are attributed. In addition to his testimony about how the amount was calculated, Mr. Calkins needs to be asked who directed him to make the calculation, why and when.

G. Mr. Huttli The City's public statement that its compliance with ORS 243.303(2) will result in increased costs to class members is a material mis-representation by the City, but one which the City has continually asserted as its ultimatum to the court and the class members. Not only did the court not authorize such a amount, but the City still turns a blind eye to Oregon law prohibiting a payroll deduction from employees without the express and written authority of employees. Knowledge of this statute, ORS 652.610(3) must be accorded City Attorney Huttli, as well as defense counsel Franz, both of whom should have halted the public statements being made by Mr. Detling. Their failure to do so implicates them in the City's role in causing the retaining of

Ms. Umscheid. and states an additional reason why Mr. HuttI should be made to testify under oath.

H. Mr. Dyal As City Manager of the City of Medford, as attested to by Mr. Franz, Mr. Dyal is intimately involved, indeed intimately responsible for, the City's defense of this lawsuit:

"The defendants in this case are the City of Medford and Mike Dyal. In addition to Mike Dyal, I also represent Doug Detling and Robert Calkins. Robert Calkins is the Risk manager and an insurance expert employed by the City of Medford. Doug Detling is the Personnel Director for the City of Medford. I represent these individuals because they are part of the management team that made various decisions in this case."

Franz Aff. In Support of Reply to Plaintiff's Objection to Defendants' Submission in Opposition to All Plaintiff's Motions Concerning Notice to Class, p. 2 (emphasis added).

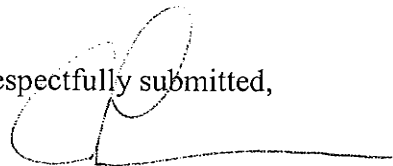
For the foregoing reasons, on a factual basis, the deposition of the above discussed individuals is clearly justified. The mis-statement of fact, and these individuals as originators of the City's defense in this case warrant their sworn testimony.

CONCLUSION

For the foregoing reasons, defendants' motion for protective order should be denied.

DATED this 12th day of July, 2010.

Respectfully submitted,



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