

IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF JACKSON

JOSEPH BOVA,

Case No. 08-1663-E7

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.

PLAINTIFF’S MEMORANDUM
IN SUPPORT OF ORCP 79
MOTION FOR INJUNCTION

INTRODUCTION

Plaintiff’s motion is necessary because defendants have engaged in conduct adversely affecting the management employees group of this class action, causing on-going immediate and irreparable harm. Plaintiff therefore seeks an injunction ordering defendants to cease and desist their harmful conduct, which includes:

- *Ex parte* contact with at least 105 class action members in violation ORCP 32 E, and the attorney/client relationship; and
- Dissemination of false and/or misleading information, unauthorized by this court, to management members of the class as well as to the general public.

FACTS

Douglas Detling (“Detling”), acting in his official capacity, not as a class member, drafted or caused to be drafted a “Petition” for signature by all class members. It reads:

“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.”

Defendants’ Submission in Opposition to All Plaintiff’s Motions Concerning Notice to Class.

On information and belief, Detling had approached the 105 members of the management employee class for their signatures, but did not explain in any detail the reason for the Petition, stating on at least one occasion something to the effect of, “Just sign this. It is a formality.” Other evidence includes persons observing class members signing the Petition because it was represented as only an “administrative thing” that had no bearing on those signers’ class rights.

Once Detling had procured the signatures to the Petition, he made an appearance before the Medford City Council. He was assisted by City Attorney John Huttl. While before the City Council, Detling declared the wishes of those signing the Petition to be that they wanted their own attorney representing them because they wanted their views presented to the Court of Appeals proceeding. They wanted this contact made because of the information, originating with defendants and Detling, that the signers of the Petition would have to pay an additional \$222 a month in order to retain their present health insurance.

The City Council agreed to enact a Resolution based on Detling’s presentation because it “would be in the best interests of the City of Medford,” to have the wishes of the signers of the Petition expressed to the Court of Appeals. The City Council also authorized payment of

\$20,000 for the retaining of attorney Lisa Umsheid to represent these management employees. There is evidence attorney Umsheid had already been contacted prior to Detling's City Council appearance. Attorney Umsheid now represents at least 70 members of the class action and has made filings with the Court of Appeals without any notice of appearance before this court.

Plaintiff was served with a copy of the Petition as filed by defendants' counsel, attorney Franz, on June 3, 2010. Shortly thereafter plaintiff served notices of deposition to Mssrs. Detling, Huttli, Dyal and Calkins. Attorney Franz objected to the notices, stating in his supporting affidavit that the proposed deponents are represented by him in their official capacity, but are represented by attorney Umsheid in their individual capacities, putting it on plaintiff to figure out how to navigate the dual status of the proposed deponents. In addition, attorney Franz then denied, even though he filed a copy of the Petition with this court and the Court of Appeals, and knew Umsheid had been contacted "about a month ago, that he had any involvement with the acts of Detling, Robert Calkins, John Huttli, Michael Dyal or the City Council concerning contact with the management employee class members.

These facts point to intentional conduct by defendants to confuse and otherwise dis-orient this litigation. Defendants' Written Plan forecast their conduct described above:

"If the defendants are not able to obtain a stay of the enforcement of the Limited Judgment while the matter is on appeal after fully exhausting its remedies, the defendants will purchase insurance from CIS," . . .with management employees having deductions of \$222 per month per employee.

POINTS AND AUTHORITIES

A. *Defendants' ex parte contact in violation of ORCP 32 E, and the attorney/client relationship.*

1. ORCP 32E. Oregon's procedural rules state this court has authority over

–PLAINTIFF'S MEMORANDUM IN SUPPORT OF ORCP 79 MOTION FOR
INJUNCTIVE RELIEF

the conduct of class actions, including the making of appropriate orders which may be altered or amended, including “. . . Imposing conditions on the representative parties, class members, or interveners.” ORCP 32 E (3). Plaintiff could find no Oregon authority interpreting this section of the Rule. However, the federal equivalent to Rule 32 E is FRCP 23 (d) (1) (“In conducting an action under this rule, the court may issue orders that . . . (c) impose conditions on the representative parties or on interveners”).

Courts interpreting FRCP 23 (d)(1) (C) include those in the Ninth Circuit:

“The Supreme Court has acknowledged that, under Rule 23 (D), a court has the authority to issue an order limiting communications between the parties and potential class members. However, the Supreme Court has specified that ‘an order limiting conditions between parties and potential class members should be based on a clear record and specific findings that reflect the weighing of the need for such a limitation and potential interference with the rights of the parties.’” Gulf Oil Co. v. Bernard, 452 U.S. 89, 101). Such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances, *Id.* at 102. *See also* Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 790-91 (E.D., La. 1977)(describing potential abuses associated with communications with class members such as ‘the increased opportunities of the parties or counsel to ‘drum up’ participation in the proceeding, ‘obvious potential for confusion’ due to misrepresentation, as well as the adverse affect on the ‘administration of justice’.”

Fleury v. Richemont North American, Inc., 2007 U.S. Dist. LEXIS 62763 (N.D. Cal. 2007).(See also White v. Eperian Information Solutions, Inc., 2009 U.S.2 Dist. LEXIS 117979 (“A party sending out its own competing and argumentative notice and invitation to class members to ‘opt out’ defeats the purpose of the Court ensuring that class members receive a neutral notice [cite omitted].”

In this case, the granting of an injunction is warranted because Detling’s contact with class members was not the speech of one member of the management class to another. Rather, Detling, acting in his official capacity, met with City Attorney Huttl who arranged Detling’s appearance before the Medford City Council. The content of the Petition that Detling presented to the City Council, as well as the Resolution the Council enacted as a result, make it clear Detling was acting

in his official capacity only and not just as an interested class member.

Further, and most important, is the content of Detling's speech to class members. Namely, he represented that enforcement of the court's Limited Judgment would cost class members an additional \$222 per month in premiums out of their own pockets. This information is not just false, it is also information not sanctioned by this court. The reasonable conclusion to be made, then, is that Detling, Huttel, and by implication Calkins, Dyal and attorney Franz, are responsible for intentionally disseminating information known to be false, was unauthorized, and was intended to confuse and mis-lead the management employee class action group. The confusion caused to the class group, the harm done to class members' rights if you will, is that those class members now believe this litigation is hostile to their and the City's interests and rights, and that plaintiff's case needs to be blocked. In fact, the exact opposite is the reality because of the court's directives in the Limited Judgment and defendants' failure to produce any basis, legally and/or factually, about how the Limited Judgment will produce the result they claim. Moreover, defendants' conduct has created the artificial circumstance of making class members believe class counsel are adversaries of their interests when nothing could be further from the truth.

Accordingly, and due to the intentional conduct of defendants, the court should cause an injunction to issue, narrowly drawn, which prohibits the City, the City Council, Michael Dyal, John Huttel, Douglas Detling, and Robert Calkins, as well as any of these individuals' support staff, from communicating in any manner with management class employees concerning the subject matter of this lawsuit without the consent of class counsel and/or the approval of the court. In addition, the injunction should enjoin the City Council's implementation of any aspect of Resolution 2010-117 because the Petition resulting in the enactment of the Resolution was caused by the improper

communication between defendants and management employee class members without the consent of class counsel or approval of the court, and because the Detling Petition was based on false information. In addition to the revocation, defendants should be made to distribute to class members a letter, to be approved by the court, stating their information was incorrect and was not authorized by the court,

2. Attorney/ Client Privilege. The actions of attorneys Huttel and Franz, as they relate to the issues at hand, appear to be professionally unethical. Under Rule 4.2 of the Oregon Rules of Professional Conduct, in “representing a client or the lawyer’s own interest, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject.” Mr. Huttel’s actions assisting Detling, and by extension, Robert Calkins and Michael Dyal, all of whom are represented by attorney Franz concerning the subject of representation, appears to violate ORPC 4.2.

Furthermore, attorney Franz’ filing of the Detling Petition likewise is professionally improper as it is not conceivable he would have possession of the Petition without knowing how it was distributed for signature to the class members. His knowledge of the improper contact by Detling, when coupled with his use of the improperly procured Petition, constitutes improper contact with a represented party.

CONCLUSION

For the foregoing reasons, plaintiff’s ORCP 79 Motion for Injunctive Relief should be granted.

ORCP 17 (C) Certification

Plaintiff brings this motion in good faith, is based on his information and belief due to

investigation and consideration of the facts available to him as alleged above. The motion is not made for any improper purpose, to harass, or to cause unnecessary delay or needless increase of the cost of litigation.

DATED July 20, 2010.

Respectfully submitted,

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