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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERROD FINDER, on behalf of himself
and on behalf of all other similarly situated
individuals,

Plaintiffs,

v.

LEPRINO FOODS COMPANY and
LEPRINO FOODS DAIRY PRODUCTS
COMPANY,

Defendants.

and Related Consolidated Action

Case No. 1:13-cv-2059-AWI-BAM

**ORDER ON DEFENDANTS’ MOTION TO
LIMIT PLAINTIFF’S COUNSEL’S
COMMUNICATIONS WITH PUTATIVE
CLASS MEMBERS**

I. INTRODUCTION

Before the Court is Defendants’ Motion to Limit Plaintiff’s Counsel’s communication with the putative class via an online Facebook.com group (“Facebook group”), which is dedicated to a discussion about the underlying consolidated putative class action.¹ (Doc. 74). Plaintiff filed his opposition to the Motion on January 6, 2017. (Doc. 75). Defendants filed a reply on January 13, 2017. (Doc. 76). The Motion was heard on January 20, 2017, before United States

¹ This putative class action, in which Jerrod FINDER is named plaintiff, has been consolidated with *Talavera v. Leprino*, 1:15-cv-105-AWI-BAM, in which Jonathan Talavera is a named plaintiff. (Doc. 63).

1 Magistrate Judge Barbara A. McAuliffe. Attorneys Philip Downey and Morris Nazarian appeared
2 by telephone on behalf of consolidated Plaintiffs Jerrod Finder and Jonathon Talavera. Attorney
3 Kyle Mabe appeared by telephone on behalf of Defendants Leprino Foods Company and Leprino
4 Dairy Products (“Leprino” or “Defendants”). (Doc. 79). Having considered the motion,
5 argument presented at the hearing, as well as the Court’s file, Defendants’ Motion to Limit
6 Plaintiff’s Counsel’s Communications is DENIED.

7 **II. BACKGROUND**

8 **A. Overview of the Facts**

9 On November 15, 2013, Plaintiff Jerrod Finder filed a wage and hour class action against
10 Leprino, alleging California Labor Code violations including failures to provide a second meal
11 break or accurate itemized statements, waiting time violations, Unfair Business Practices Act
12 violations, and Private Attorneys General Act claims based on those substantive violations.
13 Plaintiff’s proposed class consists of all hourly, non-exempt employees of Leprino and the class
14 period runs from November 15, 2009 to November 15, 2013.

15 Following a number of dismissals, amendments to the complaint, and a petition for
16 appeal, Plaintiff’s claims now proceed under his Second Amended Complaint. On August 1,
17 2016, this Court certified for interlocutory appeal the question of whether meal period premiums
18 are wages or penalties under California law. The appeal was accepted by the Ninth Circuit Court
19 of Appeals on October 19, 2016.

20 In light of the interlocutory appeal, on November 11, 2016, Defendants filed a Motion to
21 Stay this action to be heard by the United States District Judge assigned to this matter. (Doc. 62).
22 As of the signing of this order, a ruling on the Motion to Stay is pending.

23 **B. Nature of the Communications**

24 Leprino argues that Plaintiff’s counsel’s communications with putative class members in
25 the Facebook group were inappropriate and intentionally misleading with the intent to harass
26 Leprino employees and create a disruptive effect among the Leprino organization. Specifically,
27 Leprino alleges that sometime in October 2016, Plant Manager Robert Tuttrup received reports
28 from several Leprino employees stating that their names, as well as the names of Leprino

1 supervisors and other putative class members had been published in several posts in a semi-
2 private “Facebook group” about the *Talavera v. Leprino Foods* lawsuit. Declaration of Sandra
3 Rappaport (“Rappaport Decl.”), ¶2; Declaration of Robert Tuttrup (“Tuttrup Decl.”), ¶ 2. Leprino
4 alleges that the Facebook group was created by Plaintiff’s counsel and was comprised of some of
5 Leprino’s putative class member past and current employees. Rappaport Decl., ¶2.

6 Using the Facebook group, counsel for Plaintiff, Phillip Downey (“Mr. Downey”), named
7 the 27 individuals, whose declarations were submitted by Leprino in support of its opposition to
8 class certification, asking those in the group to notify him “if you know anything about the
9 following individuals who are testifying for Leprino.” Rappaport Decl., ¶4, Ex. A, pgs. 3-4. In
10 another post, Mr. Downey identified a single employee (Stephanie Leonard), indicated the
11 department she worked in, and quoted a section of her declaration. Rappaport Decl., ¶4, Ex. A,
12 pg. 5. Mr. Downey then indicated that Ms. Leonard’s declaration was contrary to hundreds of
13 other employee statements, and asked that Facebook group members contact him with reasons
14 why Ms. Leonard would provide conflicting information. *Id.* In response to that post, other
15 Leprino employees responded with suggestive statements including “someone got promise [sic] a
16 promotion lol,” and “You know that’s true.” *Id.* Defendants’ argue that this commentary which
17 originated from Mr. Downey’s suggestive statement falsely insinuates that the declaring
18 employee lied in her declaration in return for an employment benefit. *Id.*

19 Mr. Downey posted other comments on the Facebook page about other named putative
20 class members, which Defendants’ again argue insinuated that those employees may have lied for
21 some improper benefit including: “How did FRANZ EMERSON make the leap from Purchasing
22 clerk to Supervisor in Warehouse w/o ever having worked a Red Hat, or even in the Warehouse
23 before being made a supervisor?” Rappaport Decl. ¶4, Ex. A, pg. 2. Another of Mr. Downey’s
24 posts states “If anyone knows how Monica Mata was promoted so quickly at Leprino, with
25 specific information, including names, please contact me privately.” *Id.*

26 Defendants also include screenshots of several inquiries by Mr. Downey asking for
27 Leprino employees to privately provide information about other Leprino employees who provided
28 declarations in support of Leprino. Rappaport Decl. ¶4, Ex. A.

1 **C. Parties' Positions**

2 Leprino argues that Mr. Downey's communications: (1) violate the Court's protective
3 order; (2) implied false accusations by insinuating that certain Leprino employees received
4 special treatment or promotions in return for providing untruthful declarations supportive of
5 Leprino; and (3) are not protected by attorney-client privilege. (Doc. 74). Collectively, Leprino
6 argues that Mr. Downey's conduct is likely to have a chilling effect on employees who are willing
7 to speak on behalf of Leprino in this lawsuit thereby hampering Defendants' ability to defend
8 against this case.

9 Also particularly troubling to Defendants are that Mr. Downey's comments appear in an
10 online public forum which Defendants argue amplifies the comments harmful nature. (Doc. 74
11 at 13); *Abdallah v. The Coca-Cola Company*, 186 F.R.D. 672, 678 (N.D. Ga. 1999) (Court held
12 that the widespread dissemination of the complaint via a website could be used by the Plaintiff to
13 coerce the defendant into settlement and potentially caused "serious and irreparable harm to
14 Defendant's reputation and its relationship with its employees."). According to Defendants, the
15 specific purpose behind Mr. Downey's comments is to create discord among the Leprino
16 workforce and silence employees supportive of Leprino's position. (Doc. 74 at 14).

17 Plaintiff responds that, contrary to Leprino's allegation, the private Facebook group was
18 created by a former Leprino employee, not counsel. Declaration of Phillip Downey ("Downey
19 Decl."), ¶4-5. The former employee—entirely on her own initiative and without any
20 encouragement from or suggestion by Plaintiff's Counsel—created a private Facebook group to
21 let other current and former employees know about the case. Downey Decl. ¶5. Mr. Downey
22 claims that he was invited to join the private group after the former employee asked Plaintiff's
23 Counsel if he would like to be "added" to the group. Downey Decl. ¶6. Plaintiff's Counsel said
24 "yes." Downey Decl. ¶6.

25 Nevertheless, Plaintiff argues that the Facebook group is an entirely appropriate way to
26 communicate with the putative class. According to Plaintiff, Mr. Downey's comments in the
27 Facebook group are aimed at vetting Leprino's declarations, which is counsel's duty. (Doc. 75 at
28 3). Moreover, Defendants have not presented any evidence from witnesses declaring that they

1 have been harassed or intimidated in response to Mr. Downey’s participation in the Facebook
2 group.

3 **D. Corrective Communication and Other Relief Requested**

4 Defendant moves for a number of curative measures to remedy the alleged harm caused
5 by Mr. Downey’s communications in the Facebook Group including:

6 (1) prohibiting Plaintiff’s counsel from further participating in the Facebook group or
7 communicating with the putative class members via any other social media or mass electronic
8 communication platform such as group texting or emailing;

9 (2) requiring Plaintiff’s counsel to remove any and all misleading ex parte
10 communications from Facebook or other social media along with any comments made by group
11 members in response;

12 (3) requiring Plaintiff’s counsel to post a curative notice stating that his previous
13 description of the testimony given by Leprino declarants was false, that no Leprino employee
14 received any benefit or promise of benefit from testifying, and that no Leprino employee will be
15 penalized for assisting Leprino by providing truthful testimony in this matter; and

16 (4) requiring Plaintiff’s counsel to “freeze” the group page so that the only post to
17 appear from the date the Order is issued is the curative notice and so that no additional postings
18 can be made by counsel or any other Facebook account-holder. (Doc. 72 at 2).

19 **III. LEGAL STANDARD**

20 Federal Rule of Civil Procedure 23(d) provides that “the court may issue orders” that
21 “require—to protect class members and fairly conduct the action—giving appropriate notice to
22 some or all class members of any step in the action,” “impose conditions on the representative
23 parties,” or “deal with similar procedural matters.” Fed. R. Civ. P. 23(d)(1). “Subdivision (d) is
24 concerned with the fair and efficient conduct of the action” Fed. R. Civ. P., Adv. Comm.
25 Notes.

26 “Because of the potential for abuse, a district court has both the duty and the broad
27 authority to exercise control over a class action and to enter appropriate orders governing the
28 conduct of counsel and parties.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). In particular, a

1 district court has the power to “limit[] communications between parties and potential class
2 members.” *Id.* at 101. *Gulf Oil* noted the “obvious potential for confusion” and adverse effect on
3 the “administration of justice” that misleading communications may cause. *Id.* at 100 n. 12
4 (quoting *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La. 1977)). The prophylactic
5 power accorded to the court presiding over a putative class action under Rule 23(d) is broad; the
6 purpose of Rule 23(d)’s conferral of authority is not only to protect class members in particular
7 but also to safeguard generally the administering of justice and the integrity of the class
8 certification process.

9 A district court’s duty and authority under Rule 23(d) to protect the integrity of the
10 class and the administration of justice generally is not limited only to those
11 communications that mislead or otherwise threaten to create confusion and to
influence the threshold decision whether to remain in the class. Certainly
communications that seek or threaten to influence the choice of remedies are . . .
within a district court’s discretion to regulate.

12 *In re Sch. Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988). In *Wang v. Chinese Daily News, Inc.*,
13 623 F.3d 743, 756 (9th Cir. 2010), *judgment vacated on other grounds*, 132 S. Ct. 74, 181 L. Ed.
14 2d 1 (2011), the Ninth Circuit similarly noted, “Rule 23(d) gives district courts the power to
15 regulate the notice and opt-out processes and to impose limitations when a party engages in
16 behavior that threatens the fairness of the litigation.”

17 **IV. DISCUSSION**

18 **A. Whether Plaintiff’s Counsels Communications Were Improper**

19 The Court is endowed with “both the duty and the broad authority to . . . enter appropriate
20 orders governing the conduct of [class] counsel and parties.” *Gulf Oil Co.*, 452 U.S. at 101.
21 While the Rules of Professional Conduct do not bar communications with putative class members
22 by an opposing party, a court may choose to restrict such pre-certification communications if
23 presented with “a clear record and specific findings that reflect . . . the need for a limitation and
24 the potential interference with the rights of the parties.” *Parks v. Eastwood Ins. Services, Inc.*, 235
25 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002). A restriction on communications between counsel and
26 putative class members should be based on whether the communication at issue is “misleading or
27 improper.” *Id.*

1 Mr. Downey argues that prospective class counsel is not prohibited from communicating
2 with prospective class members. Further, that the Facebook group is a perfectly appropriate
3 means for class counsel to communicate with potential class members and witnesses. (Doc. 75 at
4 3). However, this does not mean that prospective class counsel can communicate with the
5 putative class in a misleading or improper way. Leprino argues that Mr. Downey’s
6 communications were misleading because they implied false allegations and are harmful because
7 they disrupt Leprino’s corporate morale. For the reasons stated below, the Court is not persuaded
8 that Mr. Downey’s comments were harmful or misleading to warrant judicial intervention.

9 By all indications, the Facebook group at issue, here, is one lawfully created by an
10 interested potential class member. Mr. Downey’s opposition and supporting declaration states,
11 without equivocation, that he and his law firm were not responsible for the creation of the
12 Facebook group. It was an employee who invited Mr. Downey to join the private Facebook
13 group. Downey Decl. ¶ 6. He merely consented to that request. This factor is important because
14 the origins of the relationship between class counsel and the putative class is a distinction that
15 matters under current case law evaluating pre-certification communications by counsel.

16 In the related and consolidated case, *Talavera v. Leprino Foods Co.*, 2016 U.S. Dist.
17 LEXIS 29633, 14-15 (E.D. Cal. Mar. 8, 2016), this Court held that:

18 Whether a communication is misleading or coercive—and therefore warrants
19 judicial intervention—often depends not on one particular assertion, but rather the
20 overall message or impression left by the communication. *See Bobryk v. Durand*
21 *Glass Manufacturing Co.*, No. 12-CV-5360, 2013 U.S. Dist. LEXIS 145758, 2013
22 WL 5574504, at *5-6 (D.N.J. Oct. 9, 2013) (noting “the absence of a bright-line
23 rule controlling pre-certification communications” requires courts to “assess[]
24 whether the factual circumstances surrounding *ex parte* communications warrant
25 the imposition of restrictions on speech”). A Court therefore “must examine ‘the
26 context in which the communications were made and the effect of the
27 communications’ in determining whether, and how much, communication should
28 be restricted.” *Stransky v. HealthONE of Denver, Inc.*, 929 F. Supp. 2d 1100,
1108-09 (D. Colo. 2013) (finding defendants’ misleading statements about
potential monetary consequences of outcome “likely to confuse, if not coerce”).

This Court further recognized that the potential for abusive or coercive statements is
particularly high in an employer/employee context. *See Talavera*, 2016 U.S. Dist. LEXIS 29633,

1 at *13; *Camp v. Alexander*, 300 F.R.D. 617, 624 (N.D. Cal. 2014) (“The caselaw nearly
2 universally observes that employer-employee contact is particularly prone to coercion”). That
3 reasoning guides the Court’s analysis here.

4 Absent from the communications here is any potential for coercion or undue influence by
5 Plaintiff’s counsel. Because neither Mr. Downey nor his law firm created the Facebook group, the
6 Court has little concern that members are being harassed or improperly influenced in their
7 voluntary communications with Mr. Downey. Mr. Downey is an advocate for his position in this
8 law suit; a position that members can freely take or leave. Mr. Downey’s participation in this
9 Facebook group is therefore no more than Plaintiff’s counsel’s engagement in pre-certification
10 communications with potential class members. As recognized by Defendants, several of Mr.
11 Downey’s communications are directed at uncovering information (unflattering or otherwise)
12 about potential witnesses for Leprino. This is not improper. The United States Supreme Court
13 has recognized the importance of permitting class counsel to communicate with potential class
14 members for the purpose of gathering information, even prior to class certification. *Gulf Oil Co.*,
15 452 U.S. at 102-03. Further, in *Abdallah*, relied on by Defendants, the Court found

16 Plaintiffs and their counsel are entitled to speak freely about this lawsuit with any
17 potential class member that contacts them. Even though the class had not been
18 certified in *Jackson*, the Eleventh Circuit let stand that portion of the district
19 court's order that authorized Plaintiffs’ “inquires and communication that would be
20 allowable as a normal discovery matter, whether the . . . class is certified or not.”
21 *Id.* at 1008 n. 19 (citations omitted). Such communications, when initiated by
22 potential class members and not Plaintiffs’ counsel, are neither widespread nor
23 injurious and the Court therefore permits Plaintiffs to: (1) discuss the merits of the
24 suit with potential class members who contact them; (2) determine whether that
25 potential class member possesses any evidence relating to the Complaint
26 allegations; (3) prepare affidavits or other testimony in support of class
27 certification or the merits of the case; and (4) discuss with potential class members
28 the possibility of representation by Plaintiffs’ counsel and of providing legal
services to them.

Abdallah, 186 F.R.D 672 at 677.

26 Like in *Abdallah*, arguably, the bulk of the comments made by Mr. Downey are aimed at
27 “determin[ing] whether that potential class member[s] possess any evidence relating to the
28 Complaint allegations.” *Id.* Moreover, Mr. Downey’s inquiries regarding whether potential class

1 members know information about the employees who provided supportive declarations is within
2 the realm of reasonable discovery under Rule 26. In general, under the Federal Rules of Civil
3 Procedure, any matter relevant to a claim or a defense is discoverable. Fed.R.Civ.P. 26(b)(1). The
4 broad scope of discovery under Rule 26(b)(1) encompasses any matter that is relevant to any
5 claim or defense in the case, including witnesses. See generally, *Oppenheimer Fund, Inc. v.*
6 *Sanders*, 437 U.S. 340, 351 (1978).

7 Other posts are less neutral: Mr. Downey's statements that one declarant's account was
8 different than accounts from hundreds of other employees, and questions about how two Leprino
9 declarants received promotions. Mr. Downey asserts that these statements are benign, while
10 Defendants argue that the clear implication of these comments misleads their employees to
11 believe that certain other employees improperly perjured themselves in exchange for benefits.
12 (Doc. 76 at 5).

13 While the Court acknowledges that Plaintiff's counsel's comments may consist of
14 insinuations that cast Defendants and the supporting declarants in a negative light, those
15 comments do not mislead employees about their rights as potential class members. Mr. Downey's
16 comments do not create confusion or seek to influence whether members opt-in or opt-out of the
17 class. Rule 23(d) grants "broad powers to make 'appropriate orders' and 'to enjoin
18 communications with class members to protect them from undue interference.'" *In re McKesson*
19 *HBOC, Inc. Sec. Litig.*, 126 F. Supp.2d 1239, 1242 (N.D. Cal. 2000). Defendants' arguments boil
20 down to concerns about whether Mr. Downey's comments potentially expose Leprino employees
21 to negative commentary or office gossip. Ultimately, however, case law does not require that
22 communications to potential class members be objective and neutral. *Babbitt v. Albertsons Inc.*,
23 1993 U.S. Dist. LEXIS 21491 (N.D. Cal. Mar. 31, 1993).

24 Moreover, it is not enough that merely a potentially chilling effect on the litigation exists.
25 Leprino, out of fear of exposing their employees to further harassment, has declined to present
26 evidence that any members of the Facebook group have harassed Leprino employees in the
27 workplace. This leaves the Court to speculate whether the references to the employees in the
28 Facebook group are harassing enough to discourage employees from further participation on

1 behalf of Leprino in this suit. “[T]he mere possibility of abuses does not justify routine adoption
2 of a communications ban that interferes with the formation of a class or the prosecution of a class
3 action in accordance with the Rules.” *Gulf Oil*, 452 U.S. at 104, 101 S.Ct. at 2202. Defendants’
4 purely speculative concerns regarding the prejudicial effect on employees supportive of Leprino
5 therefore do not convince the court that judicial intervention is necessary here.

6 Finally, based on the record so far in this case, the Court does not find that the comments
7 by Mr. Downey will produce a chilling effect. First, the names of the Leprino declarants’ and
8 their supporting declarations were already publicly available on the Court’s docket. Thus, there is
9 little concern that Plaintiff’s counsel is “outing” these individuals as showing support for Leprino.
10 Second, as Defendants admit, Mr. Downey has already asked members of the Facebook group to
11 refrain from “intimidating” Leprino witnesses by contacting them. Rappaport Decl., ¶3, 4, Ex. A,
12 pg. 6. Third, the statements are not misleading or abusive. Because the Court finds judicial
13 intervention unnecessary here, the Court will refrain from commenting on whether the corrective
14 measures suggested by Defendants are constitutional. The Court will however briefly address
15 Defendants other arguments regarding attorney client privilege and the protective order.

16 **B. Attorney Client Privilege**

17 Plaintiff is cautioned that his communications and comments made generally to this
18 Facebook group may waive future claims to attorney-client privilege. The voluntary and public
19 nature of these communications to individuals that may ultimately have no connection to this
20 lawsuit may destroy the privilege. *In re Pac Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir.
21 2012); *see also Clady v. County of Los Angeles*, 770 F.2d 1421, 1433 (9th Cir. 1985) (the
22 voluntary disclosure of a privileged attorney-client communication constitutes waiver). The
23 Court however does not rule on the issue at this time.

24 **C. Stipulated Protective Order**

25 Finally, Defendants’ argument that Plaintiff’s counsel’s Facebook group communications
26 violate the spirit of the stipulated protective order is misguided. In relevant part, the Protective
27 Order states that:
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1 To the extent Defendants produce to Plaintiff the names, home address, home
2 telephone numbers or other personal contact information for any of Defendants'
3 current or former employees ("putative class members"), such names and contact
4 information will be deemed CONFIDENTIAL Protected Material. Plaintiff will
5 not personally access or use any such information that may be produced by
6 Defendants. If Plaintiff's Counsel desires to use any names and contact
7 information of putative class members produced by Defendants to contact the
8 putative class members, during Plaintiff's Counsel's initial communication with
9 each putative class member, Plaintiff's Counsel must inform each putative class
10 member that he or she has a right not to talk to Plaintiff's Counsel and that, if he or
11 she elects not to talk to Plaintiff's Counsel, Plaintiff's Counsel will terminate the
12 contact and not contact them again. During Plaintiff's Counsel's initial
13 communication with each putative class member, Plaintiff's Counsel must inform
14 each putative class member that the attorney representing Leprino in this matter is
15 Sandra L. Rappaport of the law firm Hanson Bridgett LLP, and her telephone
16 number is: (415) 777-3200, accompanied by a warning that Defendant's Counsel
17 does not represent the putative class members in this matter.

18 Briefly summarizing, the Protective Order states that, if Defendants produce contact
19 information for class members, Plaintiff's Counsel will not use such information to contact class
20 members without a specified disclaimer. Order, Doc. 30, ¶ 12.5. As discussed above, Mr.
21 Downey's participation in the Facebook group was by invitation from an interested class member.
22 Potential class members that join the Facebook group must either request permission to join the
23 group or consent to participation in the group if sent an invitation. This relevant portion of the
24 Protective Order therefore does not apply to these circumstances. The text and spirit of the
25 protective order is to preclude Plaintiff's counsel from using Defendants' phone list to cold call or
26 harass Leprino employees who may not be interested in discussing the merits of this lawsuit. The
27 Facebook group provides the opposite scenario. Potential class members interested in more
28 information about the lawsuit are seeking out the Facebook group in order to gather additional
29 details about the suit. Their consent to discuss the lawsuit with Plaintiff's counsel is undoubtedly
30 tied to their membership in the Facebook group.

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V. CONCLUSION AND ORDER

For the reasons explained above, Defendants’ Motion to Limit Facebook communications is DENIED.

IT IS SO ORDERED.

Dated: January 20, 2017

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE