IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JONATHAN FELPS, Individually and On Behalf of All Others Similarly Situated,	§	
	§	**Civil Action No.**
Plaintiffs,	§	
	§	**2:18-CV-811 MV-GJF**
v.	§	
MEWBOURNE OIL COMPANY, INC. and D. DREW GREENE,	§	
Defendants.	§	

PLAINTIFF'S EMERGENGY MOTION FOR CORRECTIVE NOTICE, TO PROHIBIT CLASS COMMUNICATIONS BY DEFENDANTS, TO SET ASIDE SETTLEMENT AGREEMENTS, AND FOR FEES AND COSTS

Plaintiff Jonathan Felps ("Plaintiff") on behalf of himself and all others similarly situated ("Class Members" herein) files this Emergency Motion for Corrective Notice, to Prohibit Class Communications by Defendants, to Set Aside Settlement Agreements, and for Fees and Costs.

I. INTRODUCTION

Plaintiff has sued Defendants under both the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. ("FLSA") and the New Mexico Minimum Wage Act, N.M. Stat. Ann., § 50-4-22 ("NM Wage Act"). Dkt. 36. Plaintiff filed a motion for conditional certification of an opt-in collective action pursuant to 29 U.S.C. § 216(b) to assert claims under the FLSA on October 12, 2018. Dkt. 12. That motion remains pending. Plaintiff has also recently filed a motion for certification of a Rule 23 opt out class action in order to assert claims arising under the NM Wage Act. Dkt. 62. Plaintiff conferred with Defendants regarding his Rule 23 motion on April 25, 2019.

Thereafter, on May 6, 2019, during a mandatory company meeting, while the motion for conditional certification was pending, and about two weeks before Plaintiff filed his Rule 23 motion (and 11 days after Defendants knew its filing was imminent), Defendants offered approximately 50 current employees who are also putative class members in this case a settlement in the form of a payment in exchange for a release of wage and hour claims against the Defendants.

Plaintiff contends that Defendants' *ex parte* communication with these putative class members was improper because it was coercive, misleading, and a naked attempt to undermine the collective and class action treatment of this case. As a result of Defendants' improper *ex parte* communication, Plaintiff now seeks an emergency order (1) invalidating the releases obtained as a result of the communication, (2) prohibiting Defendants or their counsel from communicating about this lawsuit or the claims or defenses asserted in it with any putative class member, (3)

corrective language in a communication to come directly from Defendants, (4) awarding Plaintiff the attorneys' fees and costs incurred in bringing this motion.

II. FACTUAL BACKGROUND

On April 25, 2019, Plaintiff conferred with Defendants to determine if they were opposed to his Rule 23 motion to certify a class under the NM Wage Act. *See* Exhibit A. On May 6, 2019, Defendant Mewbourne held a mandatory employee meeting. (Exhibit B, Declaration of Jeffery Fraley, ¶ 4). A former Mewbourne Lease Operator, Jeff Fraley, has testified about the meeting at which Defendants made settlement offers to the putative class members. Mr. Fraley was not present at the meeting. However, Mr. Fraley testified about an account of the meeting that he heard directly from a current employee who was at the meeting, but who does not wish to testify about it for fear of retaliation. (*Id.*, ¶ 3).

The ostensible purpose of the meeting was to discuss Mewbourne's employee insurance plans. (*Id.*). However, before the meeting regarding benefits started, Mewbourne's Hobbs Superintendent, Robin Terrell, addressed all of the employees. (*Id.*). Mr. Terrell then told those in attendance that that fifty Lease Operators who were expecting letters should go see Scott Lacy after the meeting to pick up a letter related to this lawsuit. (*Id.*). Scott Lacy is Mewbourne's Production Superintendent who reports to Mr. Terrell. (*Id.*). Those fifty employees were on notice and expecting letters because, approximately two or three days prior, they had received a phone call from Mr. Lacy telling them they would be receiving a letter related to the lawsuit at the May 6, 2019 meeting. (*Id.*).[1] At the end of the May 6 meeting, Mr. Terrell again directed those 50

[1] The letter also refers to "a memo concerning [this] lawsuit . . . against Mewbourne Oil Company and Drew Greene" that the employees had "previously received." (*Id.*, Att. 1, p. 1). Plaintiff submits what he assumes to be that memo (a memo of February 21, 2019) as Exhibit C. If there are any other communications with the class regarding this case, Plaintiff is unaware of them. However, Plaintiff urges the Court to order

employees to pick up their letters. (*Id.*, ¶ 5). Defendants had prepared letters to each of those individuals and placed them in manila envelopes with each person's name written on them. (*Id.*). Accompanying the letter was a settlement agreement and release. (Ex. B, Attachment 1, p. 4).2

This mandatory employee meeting and the way in which Defendants presented the settlement agreement and release were coercive. For example, the individual whose account Mr. Fraley has testified about felt pressured to sign the release for fear that Mewbourne would retaliate against him or blackball him. (Ex. B, ¶ 7). He felt that way because he was called out in front of every other New Mexico employee for an issue related to the lawsuit and everyone at the meeting saw him and the other employees walk toward the front desk to pick up their envelopes. (*Id.*). In addition, other employees are said to have signed the release out of fear of retaliation. (*Id.*, ¶ 11).

Mewbourne's letter is also misleading. While it mentions in passing "claims . . . that you may have against Mewboure," the letter presents the release to the employee as though all parties involved are part of "the Mewbourne team." (Ex. B, Att. 1, p. 3). In the second paragraph of the letter, Mewbourne dangerously conflates Rule 23 class actions with FLSA Section 216(b) collective actions. In that paragraph Mewbourne discusses Felps' motion to certify a "class action" under the NM Wage Act. (*Id.*, p. 1). At the end of that paragraph, Mewbourne purports to characterize the type of notice the class member might receive from the Court in the event a class action is certified, and then states that "if a class action were certified, you would be part of Jonathan Felps' lawsuit if you did nothing." (*Id.*). As discussed below, this sentence is simply false as it relates to a Section 216(b) collective action, which requires the employee to opt into the

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Defendants to produce any such communications that are not already in the record. *See Manual on Complex Litigation* 4th, §21.12, p. 248 ("[T]he court might consider requiring production of communications [by defendants] relating to the case.")

[2] Although the meeting occurred on May 6, 2019, for reasons unknown, the letter that Mewbourne delivered at the meeting is dated May 7, 2019. (*Id.*).

class. Moreover, and of course, nowhere in the letter does Mewbourne warn the employees that, if they do not opt in, their statutes of limitation could continue to run. In addition, nowhere does the letter discuss in any meaningful detail the claims that Plaintiff is making in this case or, most importantly, the relief that he seeks. (*Id.*).

Mewbourne offers only $1,000.00 for each year of service in exchange for the release. Mewbourne specifically characterizes this offer as "a compromise *to compensate you* in exchange for a release of any potential overtime claims under any state or local law that you may have against Mewbourne." (*Id.*, p. 1 (emphasis added)). However, first, the letter only discusses claims the reader "may have against Mewbourne," with no mention of claims against Defendant Greene. Yet, the release almost certainly benefits both. (*Id.*, p. 4). Second, $1,000.00 per year amounts to only $19.23 per week; and even assuming that the employee worked only 60 hours per week (in reality they worked 60-80 hours per week), that is approximately $.96 per hour of overtime worked. (Ex. B, ¶¶ 9-10). That is hardly the "compensate[ion]" the employee earned; and it does not approximate the relief Plaintiff seeks in this lawsuit.

The letter and the release purport, in places, to release only wage and hour claims arising under "state or local law." (Ex. B, Att. 1, pp. 1, 4). However, the last sentence of the release itself specifically states that "my signing of this Release will extinguish *all* unpaid wage and overtime claims, including interest, penalties, and liquidated damages, I may have through today's date." (*Id.*, p. 4 (emphasis added)).

Finally, in the letter, Mewbourne does not identify class counsel or advise the employees that they may wish to consult with counsel of their choosing before signing the agreement. (*Id.*). Other aspects of the letter and release are discussed in the Argument and Authorities section below.

III. ARGUMENT AND AUTHORITIES

A. Legal Principles Controlling the District Court's Oversight of Unauthorized *Ex Parte* Communications with Putative Class Members.

1. The District Court is Authorized and Empowered to Manage Defendant's Unauthorized and Misleading Communication in this Case.

This court's authority to manage a party's communication with the putative class applies with equal force to both Rule 23 classes and FLSA Section 216(b) collective actions. In the seminal Rule 23 case, *Gulf Oil Co. v. Bernard*, the Supreme Court "recognized the potential for abuse in communication with potential class members and the district court's authority to enter orders limiting such communication where needed." *Weller v. Dollar General Corp.,* No. 17-2292, 2019 WL 1045960, *3 (E.D. Pa., March 4, 2019) (*citing Gulf Oil Co. v. Bernard,* 452 U.S. 89, 104 (1981)); *see also In re School Asbestos Litigation*, 842 F.2d 671, 683 (3d Cir. 1988) (invoking Rule 23's "dual policies of protecting the interests of absent class members while fostering the fair and efficient resolution of numerous claims involving common issues" and holding the court had discretion under *Gulf Oil* to manage misleading and confusing communication with putative class members).

Under Federal Rule of Civil Procedure 23(d), the district court has broad discretion to manage the parties' communications with putative Rule 23 class members even before class certification. *Barreras v. Travelers Home and Marine & Ins. Co.*, No. 12-cv-354 KG/SCY, 2014 WL 12521456, *1 (D.N.M., November 13, 2014) (*citing Gulf Oil*, 452 U.S. at 100), report and recommendation adopted, 2014 WL 12523771 (D.N.M., December 9, 2014); *see also Keystone Tobacco Co., Inc. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 154 (D.D.C. 2002) (*citing Gulf Oil*, 452 U.S. at 101) ("As an initial matter, the Court rejects defendants' position that it has no authority to limit communications between litigants and putative class members prior to class

certification."); *Weller*, 2019 WL 1045960, *3 (holding that defense counsel made improper pre-certification contact with 16 putative class members); *Gortat v. Capala Bros., Inc*., No. 07–CV–3629(ILG)(SMG), 2010 WL 1879922, *2 (E.D.N.Y. May 10, 2010) ("even before certification," a court "may regulate communications by parties and their counsel with putative class members"). "This includes the authority to limit or otherwise monitor communications between the parties and the potential class members." *Barreras*, 2014 WL 12521456, *1 (*citing In re School Asbestos Litigation*, 842 F.2d at 683; *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1206 (11th Cir. 1985)). The Court has a "preeminent role in managing the notification process" in any class action. *Kleiner*, 751 F.2d at 1200 (*citing In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1012 n. 8 (5th Cir.1977)).

As far as FLSA Section 216(b) collective actions are concerned, the Supreme Court has held that Federal Rule of Procedure 83 "endorses measures to regulate the actions of the parties to a multiparty suit." *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 172 (1989); *see also Digidio v. Crazy Horse Saloon & Rest., Inc.*, 880 F.3d 135, 143 (4th Cir. 2018) ("When it comes to FLSA collective actions, the mechanism by which parties join an ongoing lawsuit reposes in district courts the responsibility to supervise and manage contacts with potential plaintiffs.")

As in Rule 23 cases, courts have broad authority to manage the conduct of counsel and parties in FLSA collective actions. *Pacheco v. Aldeeb*, 127 F. Supp. 3d 694, 697-98 (W.D. Tex. 2015); *Williams v. Sake Hibachi Sushi & Bar, Inc.*, No. 3:18-CV-0517-D, 2018 WL 4539114, *2 (N.D. Tex. Sept. 21, 2018) (*citing Hoffmann-La Roche Inc.*, 493 U.S. at 170-71); *see also Belt v. Emcare, Inc.,* 299 F. Supp. 2d 664, 667 (E.D. Tex. 2003) ("[B]ecause of the potential for abuses in collective actions, such as unapproved, misleading communications to absent class members, '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.'") (*quoting Gulf Oil,* 452 U.S. at 100). "Such managerial responsibility begins once the collective action is filed, before the court conditionally certifies the class or authorizes a section 216(b) notice." *Vogt v. Tex. Instruments Inc.*, 2006 WL 4660133, *2 (N.D. Tex. Aug. 8, 2006) (*citing Hoffmann-La Roche*, 493 U.S. at 170-71). The Fourth Circuit recently described a court's supervisory authority as follows:

> [D]istrict courts must be able to supervise contacts between the parties and their respective counsel to ensure that potential plaintiffs are not misled about the consequences of joining a class in an ongoing employment dispute. The district court's supervisory role helps to ensure that "employees receiv[e] accurate and timely notice ... so that they can make informed decisions about whether to participate."

Digidio, 880 F.3d at 144 (*citing and quoting Hoffmann–La Roche,* 493 U.S. at 170).

Courts also scrutinize the context of the communication in deciding whether or not to manage a party's communication with putative plaintiffs. *See, e.g., Kleiner*, 751 F.2d at 1202; *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 634 (N.D. Tex. 1994) ("It is difficult to conceive of any advice from [defendant] regarding the lawsuit that is not rife with the potential for confusion and abuse given [defendant]'s interest in the suit."). "If the class and class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive." *Kleiner*, 751 F.2d at 1202–03. "The context here is of particular concern, as 'an employment relationship exists between the parties, which itself may increase the risk that communications will have a coercive effect.'" *Stransky v. HealthONE of Denver, Inc.*, 929 F.Supp.2d 1100, 1109 (D. Colo. 2013), *quoting Bass v. Pjcomn Acquisition Corp.,* 2011 WL 902022, *4 (D. Colo. Mar. 14, 2011) (*citing Belt*, 299 F.Supp.2d at 268). When the putative class members' employer holds a mandatory meeting, "the context carries an inherent possibility of coercion." *Stransky*, 929 F. Supp. 2nd at 1109; *see also Belt*, 299 F. Supp. 2d at 268;

Bublitz v. E.I. duPont de Nemours & Co., 196 F.R.D. 545, 548 (S.D. Iowa 2000) ("Where the defendant is the current employer of putative class members who are at-will employees, the risk of coercion is particularly high; indeed, there may in fact be some inherent coercion in such a situation") (emphasis added)); *Abdallah v. Coca-Cola Co.,* 186 F.R.D. 672, 678 (N.D. Ga. 1999) (observing that "simple reality suggests that the danger of coercion is real" when potential class members are employed by the defendant).

2. A Court May Order Corrective Notice If the Ex Parte Communication is Misleading, Coercive, or an Attempt to Undermine the Collective Action or Confidence in Class Counsel.

While a district court's authority to manage and supervise those contacts is broad, it is not limitless. *Barreras*, 2014 WL 12521456, *1; *Mueller v. Chesapeake Bay Seafood House Assoc., LLC*, No. ELH-17-1638, 2018 WL 1898557, *5 (D. Md., April 20, 2018) (*citing Gulf Oil*, 452 U.S. at 101); *Stransky*, 929 F.Supp.2d at 1105-06. Any order that this Court issues must be based on a clear record and specific findings, and it must be balanced against the parties' rights of free speech and association. *See Id.* However, "untruthful or misleading speech has no claim on first amendment immunity." *Kleiner*, 751 F.2d at 1204 (*citing Central Hudson Gas Co. v. Public Service Commission,* 447 U.S. 557, 566 (1980) *and Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 771 (1976)).

District courts follow a two-step process to determine whether to issue an order governing or correcting communications with putative class members. *See, e.g., Vogt*, 2006 WL4660133 at *3; *Belt*, 299 F.Supp.2d at 668; *Mueller*, 2018 WL 1898557 at *5. First, the court must decide whether the court should limit a party's communications with putative plaintiffs. *Barreras*, 2014 WL 12521456, *1; *Vogt*, 2006 WL 4660133, at *3 (*citing Belt*, 299 F.Supp.2d at 668). In order to manage the commercial speech at issue in the class and collective context, while "some evidence

beyond 'the mere possibility of abuses' is required . . . [a] showing of *actual* harm is not always necessary." *Agerbrink v. Model Serv. LLC*, 2015 WL 6473005, *2 (S.D.N.Y. Oct. 27, 2015) (citing *Hampton Hardware, Inc.*, 156 F.R.D. at 633) (emphasis added); *Dziennik v. Sealift, Inc.*, 2006 WL 1455464, *3 (E.D.N.Y. May 23, 2006) ("[A] district court's authority under Rule 23(d) is not limited to communications that *actually* mislead or otherwise threaten to create confusion . . . .") (emphasis added)) (*quoting In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 252 (S.D.N.Y. 2005)) "Examples of abusive communications warranting court intervention include misleading communications, coercive communications, and communications designed to undermine confidence in class counsel." *Barreras*, 2014 WL 12521456 at *2, (*citing In re School Asbestos Litigation*, 842 F.2d at 683 n. 22 and *Cox Nuclear Med. v. Gold Cup Coffee Servs*., 214 F.R.D. 696, 697-698 (S.D. Ala. 2003)); *see also*, *Mueller*, 2018 WL 1898557 at *5 (the inquiry is whether the communication is "misleading, confusing, coercive, or improper.") (*quoting Stransky*, 929 F.Supp.2d at 1106). Second, if the court concludes that a party has engaged in "abusive communication," it "tailor[s] appropriate injunctions and sanctions in light of First Amendment concerns." *Vogt*, *3; *see Stransky*, 929 F.Supp.2d at 1109-13.

B. The Court Should Issue Corrective Notice Because Defendant's *Ex Parte* Communications Do Not Comply with the Law of this District.

Mewbourne's memo and letter do not provide the necessary notices under the law of this District regarding proposed settlements to putative class members. In *Barreras*, Magistrate Judge Yarbrough approved a defendant's settlement communication to a putative class, but the court did so before the defendant sent the communication. 2014 WL 12521456, *3. That is, unlike in this case, the defendant sought the guidance of the court before communicating with putative class members. After consideration, the *Barreras* court approved the defendant's proposed communication because it (1) clearly identified the lawsuit by location, name, and cause number,

(2) made clear the legal basis of the plaintiffs' claims, (3) explained that the impacts of entering into the settlement would be a release of claims and an inability to participate in the suit, (4) advised the recipient that defendant would hold the offer open for 14 days during which they should consult with their own lawyer, and (5) warned the putative class that accepting the settlement offer may result "in the recovery of less money than pursuing the litigation." *Id.*

The court went on to note that "[t]he only critical piece of information missing from Defendant's proposal is information regarding the relief sought . . . by Plaintiffs. The Court agrees that the omission of this information has the potential to be misleading given Defendant's stated intention to offer putative class members only a readjustment amount to settle." *Id.* (*citing Jones v. Jeld-Wen, Inc.,* 250 F.R.D. 554, 564 (S.D. Fla. 2008) (requiring Defendant to "fully disclose . . . the relief sought in the class action" when making settlement offers). With the addition of that "critical piece of information" to the defendant's proposed pre-certification communication with the putative class, the *Barreras* court approved it. *Id.*

Mewbourne's communications in the February 21 memo and in the May 7 letter, by contrast, contains only one of the six categories of information on which the *Barreras* court granted approval. While the February 2019 memo (Exhibit C) mentions in the subject line the style, number, and location of this lawsuit, neither document states that (1) Plaintiff is pursuing unpaid overtime under both the FLSA and the NM Wage Act, (2) upon signing, under the terms of the Release, the employees release all of their wage and hour claims and may be ineligible to participate in the suit, (3) the employee should seek the advice of their own counsel, and (4) the employee may be accepting less in the settlement than they stand to recover in the litigation. (Exh. B, Att. 1). In addition, neither the letter nor the memo contain that "critical piece of information" that is "the relief sought by the Plaintiff." *Barreras*, 2014 WL 12521456, *3. More specifically,

while Mewbourne's memo mentions that Plaintiff seeks unpaid overtime, the letter does not explicitly state how that number might be calculated. Moreover, and critically, neither document mentions the fact that Plaintiff seeks liquidated damages under the FLSA and treble damages under the NM Wage Act. (Ex. B, Att. 1; Ex. C).

C. The Court Should Issue Corrective Notice Because Defendant's *Ex Parte* Communications Are Coercive, Misleading, and Undermine the Class.

It is undisputed that the Defendant held a mandatory company meeting at its Hobbs office with 50 of its current employees who are also putative class members in this case. It is undisputed that Defendants made settlement offers to the putative class members. It is also undisputed that Defendant did not inform the Court or Plaintiff's counsel that it intended to have these communications. That communication was improper under the authorities cited above and those discussed below. While it is true that, in this district, "a defendant's transmission of a settlement offer to a potential class member is not inherently problematic[,]" the Court may manage that communication if it is coercive, misleading, and designed to undermine confidence in class counsel. *Barreras*, 2014 WL 12521456, *1. Mewbourne's communications with the plaintiff class were all three.

1. Defendants' communications are coercive.

"The test for coercion is whether the [proposed communication would] somehow overpower[ ] the free will or business judgment of the potential class members." *Barreras*, 2014 WL 12521456, *2, *quoting Jenifer v. Delaware Solid Waste Auth.*, Nos. 98-270/98-565, 1999 U.S. Dist. LEXIS 2542, *16-17 (D. Del. Feb. 25, 1999) (alterations in *Barreras*). First, the mandatory meeting on May 6, 2019 at which the communication took place—and in which the two top supervisors for Mewbourne's Hobbs office actively participated by directing the employees to pick up their letters—made the Defendants' communications regarding the lawsuit "inherent[ly]"

coercive. *Stransky*, 929 F. Supp. 2nd at 1109; *Belt*, 299 F. Supp. 2d at 268; *Bublitz,* 196 F.R.D. at 548. "The Supreme Court has acknowledged that unsupervised oral solicitations, by their very nature, are wont to produce distorted statements on the one hand and the coercion of susceptible individuals on the other." *Kleiner*, 751 F.2d at 1206 (*citing Ohralik v. Ohio St. Bar Assoc*., 436 U.S. 437, 457 (1978)). And that inherent coercion and the coercive effect of Mr. Lacy's telephone calls to the Lease Operators prior to the meeting, and Mr. Terrell's speeches during the meeting, are corroborated by the testimony of Jeff Fraley, recounted above. (*See* Ex. B, ¶¶ 7, 11). As Mr. Fraley's testimony makes clear, the Defendants' "inherent[ly] coercive" communication at a mandatory employee meeting at which the two top supervisors in that office made an "unsupervised oral solication[]" to direct the employees to pick up their letters, overpowered the free will and business judgment of the employees. (*Id.*). It was, therefore, coercive. *Barreras*, 2014 WL 12521456, *2.

2. Defendants' communications are misleading and confusing.

Defendants' letter is misleading in several respects. Most significantly, Defendants have actively misled the putative class members regarding their inclusion in any FLSA collective action. In the second paragraph of the letter, Mewbourne discusses Felps' motion to certify a "class action" under the "New Mexico Minimum Wage Act." (Ex. B, Att. 1, p. 1). At the end of the paragraph, Mewbourne notes that the class member might receive notice from the Court upon certification, and then gratuitously states that "**if a class action were certified, you would be part of Jonathan Felps' lawsuit if you did nothing**." (*Id.*) (emphasis added).

While perhaps technically correct as far as a Rule 23 "class action" under the NM Wage Act is concerned, this sentence is absolutely false insofar as a Section 216(b) collective action under the FLSA is concerned. After all, a putative class member must affirmatively opt into any

collective action in order to be a member of the FLSA class. 29 U.S.C. §§ 216(b) and 256. Yet Mewbourne's letter discusses "class actions" in a way that conflates the Rule 23 class action and the FLSA collective action. And the employees are told they need do "nothing" to be part of the "class" when in fact they must do something to be part of the Section 216(b) collective action.[3]

Compounding the problem of Mewbourne's false statement is the timing of the FLSA collective relative to the Rule 23 class. If it is inclined to conditionally certify a collective action, the Court is very likely to do so *before* it rules on Plaintiff's Rule 23 motion. As a result, by the time the class receives any Rule 23(c)(2)(B) notice, the putative class members will certainly have already received the notice of collective action. And, although anyone wishing to join the FLSA collective action is required to opt in and file a consent to do so, Mewbourne's gratuitous admonition that a putative class member "would be part of [the] lawsuit if you did nothing[]" is, without corrective notice, certain to convince putative class members that they need not do anything to be part of the FLSA "class." *Cf. Agerbrink v. Model Serv*. LLC, 2015 WL 6473005, at *2 (S.D.N.Y. Oct. 27, 2015) ("Because FLSA plaintiffs must opt-in, unsupervised, unilateral communications with those potential plaintiffs can sabotage the goal of the FLSA's informed consent requirement *by planting the slightest seed of doubt or worry through one-sided, unrebutted presentation of 'facts*.'" (emphasis added)) (*citing Billingsley v. Citi Trends, Inc.*, 560 F. App'x 914, 924 (11th Cir. 2014)). For this reason, efforts to communicate with putative members may be "more egregious in [a] collective action than it would be in a class action. . . ." *Belt,* 299 F. Supp. 2d at 669. In short, it is highly unlikely that the putative class will know the difference

[3] Moreover, while the letter is marked "Confidential," other class members who are former employees certainly saw this misleading half-truth about what is required to be involved in the class and collective aspects of this lawsuit. (*See, e.g.,* Ex. B).

between a FLSA Section 216(b) collective action and a NM Wage Act Rule 23 class action; and Mewbourne's letter exploits that knowledge gap.

Thus, in the letter Mewbourne simultaneously (1) lulls the reader into doing "nothing," and perhaps giving up their right to participate in the FLSA collective action and (2) makes a misleading pitch to release the reader's NM Wage Act claims.[4] If its ruse is successful, then, Mewbourne will have extinguished for the adherents to the letter (who do "nothing") and the signers of the release all of the claims they might make as a class member in Plaintiff's lawsuit.

As a related matter, Mewbourne's letter does not warn the reader that "if [they] did nothing," and were not included in the FLSA collective action, their statutes of limitation on their FLSA claims would continue to run. By failing to do so, Mewbourne again misleads the reader. *Cf. Stransky*, 929 F. Supp. 2d at 1108 (holding that an employer's communication with a putative class was improper even though it referred to the statutes of limitation).

Finally, Mewbourne purports to offer the settlement amount "to compensate you[.]" (Exh. B, Att. 1, p. 1). However, it offers that alleged "compensat[ion]" with no context because it does not, as discussed above, indicate what recovery Plaintiff seeks in this case. In fact, as the $1,000 per year equates to approximately $.096 per overtime hour worked (assuming only 60-hour workweeks), it is not "compensat[ion]" for their upaid overtime, as the letter suggests. (*See* Exh. B, ¶¶ 8-10). But the reader would never know that because it does not discuss any aspect of the damages Plaintiff seeks in this case.

[4] Arguably, however, the agreement releases more than just the individual's state and local claims. Mewbourne suggests throughout the letter that the release is only for wage and hour claims under "state or local law." (Id., pp. 1, 4). Even the release itself says that in one part. (Id.) However, the last sentence of the release itself specifically states that "my signing of this Release will extinguish *all unpaid wage and overtime claims*[.]" (Id., p. 4 (emphasis added)).

3. Defendants' communications undermine the class and confidence in class counsel.

The last sentence of the second paragraph of the letter is also an attempt to encourage opt-outs from the Rule 23 class. After all, in the February 21, 2019 memo and in the first paragraph of the May 7, 2019 letter, Mewbourne stresses how much it disagrees with the lawsuit, and intends to "vigorously defend[] against the claims." (Ex. B, Att. 1, p. 1). Mewbourne, of course, does not state that it has already admitted to the Department of Labor that it violated the FLSA with respect to how it paid its Lease Operators, or that it paid some of those individuals settlements as a result. Dkt. 12-6 pp. 6, 10, 12, 15, 17-18. In any event, immediately after making this misleading partisan pitch about the strength of its legal position, Mewbourne discusses this case, and then tells the reader (who is part of the "Mewbourne team") how to opt out: "you [may] choose not to participate by returning a completed form." (*Id.*). Mewbourne's attempt to solicit opt-outs is improper. *See Kleiner*, 751 F.2d at 1205-07; Conte & Newberg*, Newberg on Class Actions,* §15.19, p. 66 (4th ed. 2002) ("The solicitation of exclusions from a pending class action by a defendant before the court has determined that the case may proceed as a class action constitutes a serious challenge to the authority of the court to have some control over communications with class members."); *Domingo v. New England Fish Co.,* 727 F.2d 1429, 1441, *modified by*, 742 F.2d 520 (9th Cir. 1984) (among the "principal concerns" that could justify restrictions upon communications were "solicitation by defendants of requests to opt out").

As noted, nowhere in the communications does Defendant advise the employees that they may wish to seek the advice of their own counsel. (*Id.*). *See Barreras*, 2014 WL 12521456, *2 (permitting a defendant's communication, in part because the defendant advised the putative class members that that "'they may wish to consult with their personal attorney regarding whether to accept a settlement.'"). Worse, however, the letter does not even make clear the adversarial

relationship between Defendants on the one hand, and the putative class members on the other. (*Id.*, Att. 1). While it mentions in passing "claims . . . that you may have against Mewboure," the letter presents the release as though all parties involved are part of "the Mewbourne team." (*Id.*, p. 3). Mewbourne also does not identify class counsel. Consequently, not only is there no indication in the letter that there might be two sides to this lawsuit; Defendants also provide no path in the letter for the employees to hear both sides. *Kleiner*, 751 F.2d at 1203 (noting concern over "one-sided presentation of the facts, without opportunity for rebuttal.")

Not identifying class counsel also has the effect of undermining confidence in them. After all, and again, Mewbourne makes clear its "strong[] disagree[ment]" with Plaintiff's claims, without discussing Plaintiff's claims or the recovery he seeks in any detail at all. (Exh. B, Att. 1, p.1). Consequently, the reader is left with a wholly dismissive view from authoritative sources—Mewbourne, Drew Greene, Mr. Terrell, and Mr. Lacy—with no identification of the attorneys who are representing Plaintiff Felps. The reader is thus left with the impression that Plaintiff Felps—and class counsel—are prosecuting a baseless suit, even when Defendants have admitted their violations to the DOL. Mewbourne thus attempts, by omission, to "undermine confidence in class counsel." *Barreras*, 2014 WL 12521456 at *2; *see Pollar v. Judson Steel Corp.,* 1984 WL 161273, at *2 (N.D. Cal. 1984) (holding that the employer's communication with class members in an uncertified class action lawsuit were misleading because they did not disclose the existence of the class action lawsuit or identify class counsel).

Finally, Mewbourne suggests that it is offering the settlement "to minimize ongoing costly and time-consuming litigation[.]" (*Id.*, p. 1). Importantly, the letter does not state *whose* time and money will be "consum[ed]" by the litigation. Of course, Mewbourne knows that, even if the releases are valid, obtaining them from 50 of the "thousands" of class members is not going to

appreciably reduce its litigation costs. Dkt. 24-1 at p. 3, 22 (Mewbourne's' Response to Interrogatory No. 16).[5] Consequently, Mewbourne must intend this language to suggest that, if anyone joins the case, it will be "costly and time-consuming" for the class member. There is absolutely no basis for this suggestion. *See Stransky*, 929 F. Supp. 2d at 1106 (ordering corrective notice in part because the defendant "misinformed them regarding the monetary consequences of the outcome" of the lawsuit.)

As the Elevent Circuit noted in *Kleiner*,

> [u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damages from misstatements could well be irreparable. Regardless of whether these communications occur before or after class certification, the effect is still the same.

751 F.2d at 1203. Defendant's "unsupervised, unilateral communications with the plaintiff class" here was one-sided and damaging. Moreover, it was coercive, misleading, and undermines the class and class counsel. *Barreras*, 2014 WL 12521456, *1. The Court should, therefore, issue orders to remedy the effects of the Defendant's conduct.

D. The Court Should Issue an Order to Correct Defendants' Conduct.

Plaintiff requests that the Court invalidate the releases that it might have obtained as a result of its improper communications with putative class members. First, to the extent that the release purports to release FLSA claims, it is invalid as neither the Court nor the DOL has approved it. *See, e.g., Lopez v. El Mirador, Inc.*, No. CV 16-01257 RB-KBM, 2018 WL 582577, *3 (D.N.M., January 26, 2018) (*citing Lynn's Food Stores v. United States,* 679 F.2d 1350, 1352-54 (11th Cir. 1982)); *O'Brien v. Encotech Const. Svcs., Inc.*, 203 F.R.D. 346, 349 (N.D. Ill. 2001) (invalidating

[5] In later communications with the undersigned, Mewbourne dialed back that estimate to "hundreds" but it has not amended its response to Interrogatory No. 16.

releases of FLSA claims obtained through *ex parte* communication by the defendant employer). Second, Plaintiff requests that the Court invalidate any release of the NM Wage Act claims because, for the reasons discussed above, it was obtained through coercive, misleading, and confusing communications. *See Evangelical Lutheran Good Samaritan Soc.*, 277 F. Supp. 3d 1191, 1214 (D.N.M. 2017) (under New Mexico law, contracts may be invalidated because of duress, fraud, or unconsciounability).

Finally, the agreement is procedurally unconscionable given the circumstances surrounding its signing. Under New Mexico law, "[p]rocedural unconscionability . . . is determined by analyzing the circumstances surrounding the contract's formation, such as whether it was an adhesive contract and the relative bargaining power of the parties." *Id.*, 1217 (*citing Fiser v. Dell Computer Corp.,* 2008-NMSC-046, ¶ 20, 144 N.M. 464, 188 P.3d 1215, 1221.) "Procedural unconscionability may be found where there was inequality in the contract formation." *Id.* (internal quotations omitted) (*quoting State ex rel. King v. B & B Inv. Grp., Inc*., 2014-NMSC-024, ¶ 27, 329 P.3d 658, 669). "A contract is procedurally unconscionable 'only where the inequality is so gross that one party's choice is effectively non-existent.'" *Id. citing Guthmann v. La Vida Llena*, 1985-NMSC-106, ¶ 18, 103 N.M. 506, 709 P.2d 675, 679. A party claiming unconscionability has the "burden to persuade the fact-finder," and not "the burden to produce evidence." *Id.*, 1216. As noted above, the circumstances of the mandatory employee meeting with the two most senior officials in Mewbourne's Hobbs office was inherently coercive. Defendants thus procured the contract under duress and the manner in which the contract was procured was unconscionable, particularly considering the unequal bargaining power between the parties.

Plaintiff also requests that the Court issue the relief that the district court provided in *Stransky v. HealthONE*. 929 F. Supp. 2d at 1109-13. First, in light of the wholly misleading nature

of their communications to date, the Court should issue an order restricting the Defendants' ability to communicate with the putative class members. *See Id.* at 1109-10. The Court should both prohibit Defendants from communicating with the putative class about the claims or defenses made in this case and prohibit Defendants from offering any more settlement agreements until it can assess their fairness. *Id.*; *see also, O'Brien*, 203 F.R.D. at 348 (noting that, in prior orders, the court prohibited the employer from "seeking or accepting" settlement agreements from putative class members in a FLSA case). The Court should restrict that communication until the notice and opt-in period close for Plaintiff's FLSA case and until the Court has finally disposed of the Rule 23 motion. *See Stransky* at 1110.

Second, the Court should order Defendants to send to all putative class members the corrective notice contained in Exhibit D to this Motion. *See id*. Plaintiff requests that Defendants send this corrective notice, on Mewbourne letterhead and signed by Defendant Drew Greene, to all putative class members because it is clear that the attendees at the May 6, 2019 meeting were not the only ones to see Mewbourne's misleading letter. (*See* Ex. B). Plaintiff requests that the Court order Defendants to send the notice by mail, email, and via text message.

Third, Plaintiff requests that the Court order Defendants to pay his attorneys' fees and costs incurred in bringing this motion. *See Stranksy*, 929 F. Supp. 2d at 1110-11. Plaintiff requests that the Court set a briefing schedule for an appropriate motion. *Id.*

IV. CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion and issue an order that (1) invalidates the releases Defendants have obtained through improper communications with the putative class members, (2) restricts Defendants from communicating with any putative class members about the claims or defenses in this case, to include prohibiting

Defendants from seeking or accepting any other settlement agreements, (3) requires that Defendants send out corrective notice to the entire putative class, such as that contained in Exhibit D, by mail, email, and text message, and (4) sets a briefing schedule for a motion for Plaintiff to obtain the attorney fees and costs he has incurred in bringing this motion.

Respectfully Submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

I certify that conferred with counsel for Defendants regarding the relief requested in this Motion. Defendants are opposed to the relief requested in this motion.

/s/ *Daniel A. Verrett*
Daniel A. Verrett

CERTIFICATE OF SERVICE

I certify that I filed this document using the Court's CM-ECF electronic filing service on May 24, 2019, which will notice all parties to this case.

/s/ *Daniel A. Verrett*
Daniel A. Verrett