

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JUAN JAVIER RIVERA and  
JOSE PABLO LEMUS, Individually and  
on Behalf of Others Similarly Situated,

Plaintiffs,

v.

THE BRICKMAN GROUP, LTD.

Defendant.

Civil Action No. 05-1518

**MEMORANDUM / ORDER**

March 10, 2006

Before the court is defendant “The Brickman Group, Ltd.’s Objections to the Magistrate’s January 19, 2006 Order” (Docket # 56). For the reasons that follow, the objections will be overruled.

On November 10, 2005, Chief Magistrate Judge M. Faith Angell filed a Report and Recommendation (“R&R”) in which she recommended, *inter alia*, that this court grant plaintiffs’ motion to preliminarily certify a class. As neither party objected to this recommendation, I accepted it and certified a plaintiff class by order dated December 22,

2005.

Plaintiffs filed a number of objections to the R&R, one of which requested that, in addition to being ordered to provide addresses for putative class members (as recommended in the R&R), defendant be ordered to provide phone numbers for putative class members as well. I overruled this objection pursuant to Local Rule 72(IV)(c) because the issue had not been presented to Judge Angell. However, my order specified that the objection was overruled “without prejudice to [its] submission to Judge Angell.”

Plaintiffs later raised this issue with Judge Angell, who agreed with plaintiffs and ordered, *inter alia*, the following on January 19, 2006 (Docket # 54):

2. In addition to a list of the names and last known addresses of all members of the class as defined in the notice, Defendant shall provide to Plaintiffs’ counsel telephone numbers of the above-mentioned class members.
3. Any potential class member with whom Plaintiffs’ counsel has in-person contact shall receive a copy of the court-approved notice.
4. Should meetings be held to inform potential class members of this action, Defendant shall be informed of the date, time and place of each meeting, regardless of its location.

It is this portion of the order to which defendant now objects.

The parties disagree as to the standard under which I should review Judge Angell’s order. Defendant contends that the order seeks to modify this court’s December 22, 2005 order permitting maintenance of a class action, and therefore it implicates 28 U.S.C. § 636(b)(1)(B)<sup>1</sup> and should be treated as a report and recommendation and be reviewed *de*

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<sup>1</sup> 28 U.S.C. § 636(b) states as follows: “Notwithstanding any provision of law to the contrary –  
(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending

*novo*. Plaintiffs explain that Judge Angell’s order relates to a discovery matter (i.e. – document production) and in no way modifies this court’s decision to certify a class in this case. Plaintiffs therefore contend that Judge Angell’s order fits within the confines of 28 U.S.C. § 636(b)(1)(A) and can only be reviewed for clear error. Plaintiffs are plainly correct. Judge Angell’s order does nothing to “dismiss or to permit maintenance of a class action;” rather, it orders production of a list of names with corresponding addresses and phone numbers – clearly a discovery matter. I will review the order for clear error.

Defendant’s first assignment of error is that ordering production of putative class members’ phone numbers, thereby allowing plaintiffs’ counsel to make direct contact with potential plaintiffs, endorses a violation of Pennsylvania Rule of Professional Conduct 7.3. That rule provides, in pertinent part: “(a) A lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant

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before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law. (B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement. (C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

motive for the lawyer's doing so is the lawyer's pecuniary gain . . . . The term "solicit" includes contact in-person by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements."

Again, defendant is incorrect. There is no evidence that plaintiffs' counsel will be motivated by pecuniary gain in contacting prospective plaintiffs. The fact that plaintiffs' counsel seeks statutory fees does not constitute such evidence. Plaintiffs' counsel are employed by a non-profit legal services organization. If, like most non-profit organizations, plaintiffs' counsel's employer uses income to fund more projects rather than supplement the salaries of its employees, one can expect plaintiffs' counsel to receive no pecuniary gain whatsoever from their efforts in this litigation. Absent some evidence to the contrary, this court sees nothing in Judge Angell's order that is inconsistent with the Pennsylvania Rules of Professional Conduct<sup>2</sup>. That being the case, this court will leave it to plaintiffs' counsel and the state bar to ensure that plaintiffs' counsel comply with the Rules.

Defendant also contends that allowing plaintiffs' counsel to personally contact

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<sup>2</sup> The parties both dedicate considerable space in their submissions to argument over whether plaintiffs' counsel have a First Amendment right to contact potential clients. In this connection, both parties cite *In re Primus*, 436 U.S. 412 (1978) and related cases. These cases dealt with the question of whether a state bar association *could* limit lawyers' ability to solicit clients under certain circumstances. As I have concluded that Pennsylvania has not prohibited the type of direct contact apparently contemplated in this case, I have no occasion to consider whether the state could prohibit such contact if it so chose. The First Amendment is therefore not implicated by this ruling.

putative class members would be inconsistent with the purpose of issuing written class notice. In opposition to this argument, plaintiffs cite a number of cases in which courts ordered defendants in FLSA class actions to produce telephone numbers of putative class members<sup>3</sup>. Additionally, plaintiffs presented evidence to Judge Angell that mail service in the countries of many putative class members' residence is unreliable, particularly in rural areas. As defendant recognizes, this court has "inherent power to manage FLSA litigation to ensure that putative class members receive accurate information" (quote from defendant's submission) in a timely fashion. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170-72 (1989). Under the circumstances presented in this case, permitting alternative forms of contact in addition to mailing of the class notice appears to be the best way to get accurate, timely information about this action to putative class members. Judge Angell's order appropriately safeguards against misinformation by requiring plaintiffs' counsel to give a copy of the court-approved class notice to all putative plaintiffs with whom plaintiff has contact and by requiring plaintiffs' counsel to notify defendant before any meeting with prospective plaintiffs. Defendant has not persuaded me that these safeguards are inadequate<sup>4</sup>.

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<sup>3</sup> *Dietrich v. Liberty Square, LLC*, 230 F.R.D. 574, 580-81 (N.D. Iowa 2005); *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 395 (W.D.N.Y. 2005); *Geer v. Challenge Finance Investors Corp.*, 2005 WL 2648054 at \*5 (D. Kan. 2005); *Bell v. Mynt Entertainment, LLC*, 223 F.R.D. 680, 683 (S.D. Fla. 2004); *De La Rosa Ortiz v. Rain King, Inc.*, 2003 WL 23741409 at \*1 (S.D. Tex. 2004); *Bailey v. Ameriquest Mortgage Co.*, 2002 WL 100388 (D. Minn. 2002).

<sup>4</sup> Defendant suggests a more appropriate safeguard would be to require plaintiffs' counsel to read from a script when contacting prospective plaintiffs directly. I agree with plaintiffs that

Because I find no error, let alone clear error, in Judge Angell's challenged order, defendant's objections thereto will be overruled in their entirety.

For the foregoing reasons, it is hereby ORDERED that "The Brickman Group, Ltd.'s Objections to the Magistrate's January 19, 2006 Order" (Docket # 56) are OVERRULED.

BY THE COURT:

/s/ Louis H. Pollak

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Pollak, J.

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this would be awkward and unlikely to result in fair, effective notice to putative class members. Defendant also urges that plaintiffs' counsel be prohibited from collecting opt-in signatures at group meetings with prospective plaintiffs. This seems unnecessary, as defendant will be notified of any such meetings and presumably invited to attend; defendant can therefore mitigate or report any improprieties that might be committed at these meetings.