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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

KARL BECK, individually and on behalf of all other similarly situated California residents,

Plaintiff,

v.

POINT LOMA PATIENTS CONSUMER COOPERATIVE CORPORATION, A California Corporation, **ADAM KNOPF,** an Individual, **JUSTUS H. HENKES IV**, an Individual, **419 CONSULTING INC**., a California Corporation, **GOLDEN STATE GREENS LLC**, a California LLC, **FAR WEST MANAGEMENT, LLC**, a California LLC, **FAR WEST OPERATING, LLC**, a California LLC, **FAR WEST STAFFING, LLC**, a California LLC, and **DOES 1-50**,

Defendants.

Case No: 37-2017-00037524-CU-BT-CTL

CLASS ACTION

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF PUTATIVE CLASS MEMBER LIST AND APPROVE OPT-OUT NOTICE

Date: March 23, 2018
Time: 9:00 a.m.
Judge: Hon. Joel R. Wohlfeil
Ctrm: C-73

Plaintiff Karl Beck ("Plaintiff" or "Beck") hereby respectfully replies in support of his Motion to Compel Production of Putative Class Member List and Approve Opt-Out Notice.

Defendant Point Loma Patients Consumer Cooperative Corporation (the "PLPCC" or "Defendant") concedes through silence that contact information of absent class members is relevant, and that Plaintiff is entitled to it. Defendant's only real argument is that sending the putative class a postcard Notice containing the words "Point Loma Patients Consumer Cooperative Corporation" constitutes a serious invasion of privacy. Opposition, RoA # 61, at pp. 6:3-6 and 7:6-9. But the PLPCC's argument exceeds the bounds of reason. The Notice *on its face* never reveals anything about Defendant's business or class members' potential use of marijuana, and thus does not disclose medical treatment or suggest illegal conduct.[1]

Because the Notice itself protects the privacy of PLPCC members, case law directs the Court to inquire whether there is any "abuse of the class action procedure." But Defendant has failed to even suggest any abuse, other than its churlish accusation of a "shakedown."

Furthermore, it is irrelevant that Defendant has not challenged the adequacy of Plaintiff to serve as a class representative "to date." Defendant is reserving the right to do so in opposition to Plaintiff's motion for class certification, which would be the customary time PLPCC would raise such an argument. But even if the adequacy of Plaintiff Beck was not an issue, Plaintiff is nonetheless entitled to discover absent class member contact information as an "essential prerequisite to effectively seeking group relief, without any requirement that the plaintiff first show good cause." *Williams v. Sup. Ct.*, 3 Cal.5th 531, 538 (2017) (emphasis added).

Finally, Defendant offers *zero* legal support for its argument that the Court should approve an "opt-in" notice procedure. This is because the California Supreme Court has (at least) twice held that opt-out notice is sufficient to protect privacy interests in names and addresses. And having failed

[1] As a member patron of the PLPCC, Plaintiff is acutely aware of the privacy interests inherent in this litigation. That is why he proposes a well-tested procedure routinely approved by the California Supreme Court to protect the privacy interests of similarly situated PLPCC members.

to meet and confer on the contents of the Notice, or proffering alternative Notice for the Court's consideration, Defendant should not be permitted to delay this litigation with months of additional meet and confer and motion practice on this issue. Plaintiff's proposed opt-out Notice is non-argumentative, protects class member privacy, and should be approved as-is.

I. THERE IS NO "RELEASE" OF SENSITIVE INFORMATION

a. The Notice Language Protects Class Member Privacy

Defendant concedes through silence that the disclosure of names and addresses is not objectionable. Regardless, the PLPCC opposes Plaintiff's motion because "to obtain the name and address of a member of PLPCC is to implicitly and irrevocably know the individually identifiable information regarding that patient's … physical condition … or treatment" as well as evidence of potential criminal conduct. Opposition at p. 6:3-6, and § III.B. The problem is that Defendant's argument has already been considered and rejected by the Fourth District Court of Appeal.

In *Eisenhower Medical Center v. Sup. Ct.*, 226 Cal. App. 4th 430 (2014), the court considered the theft of a computer containing information of over 500,000 patients "to whom [the defendant health care provider] had assigned a clerical record number .... The information included each person's name, medical record number (MRN), age, date of birth, and last four digits of the person's Social Security number." *Id.*, at 432. The court of appeal concluded that none of this included *medical information* protected by the CMIA.

While analyzing the requirements of the CMIA, the court found that:

> the mere fact that a person may have been a patient at the hospital at some time is not sufficient. If interpreted as Plaintiffs wish, then release by a health care provider of personal identification would be sufficient whether or not there was a release of substantive information regarding that person's medical condition, history, or treatment. Under that construction, the fact that an individual's name is on a list released by doctor X or clinic Y is sufficient to violate the law because then it is assumed that the individual was a patient of the latter at some point. Such a construction does not comport with the plain and reasonable meaning of the statute and would render meaningless the clause "regarding a patient's medical history, mental or physical condition, or treatment."

> … Even accepting that the person was treated, this fact that he or she was a patient is not in itself medical information as defined...

Id., 226 Cal. App. 4th at 435-36 (emphasis added); *see also* CAL. CIV. CODE § 56.10(b)(1) ("A provider of health care … shall disclose medical information if the disclosure is compelled by any of the following: (1) By a court pursuant to an order of that court.").[2]

Defendant attempts to distinguish *Eisenhower* by stating that disclosing the names and addresses to a notice administrator *necessarily* reveals medical information and potential evidence of criminal conduct due to the nature of Defendant's business. But how? Defendant only makes wild assertions untethered to any analysis of the actual disclosure being proposed.

Here, Plaintiff is proposing that DART LAW or AUSTIN LEGAL GROUP provide a list of names and addresses to a third party notice administrator. No medical information or suggestion of criminality is contained in such a list, so Plaintiff's Motion cannot be denied on this basis.

But class member names and addresses will be associated with a form of notice. Does the Notice *necessarily* disclose medical information or criminal conduct as suggested by Defendant? It all depends on what the notice says. For example, a notice that simply said "Hello [name]," would not disclose any sensitive information. Therein lies the defect of Defendant's argument, and explains why the PLPCC's Opposition completely fails to analyze the contents of the proposed Notice.

So is there anything "sensitive" in Plaintiff's proposed Notice? Through meet and confer, Plaintiff scrubbed it of any reference to marijuana or other sensitive information to protect class member privacy. *See* Motion P&A, at p. 3. Instead, the Notice discusses the PLPCC's failure to distribute cooperative profits as required by the Corporations Code. *Id.*

Recognizing this, the PLPCC argues that simply mentioning the name Point Loma Patients Consumer Cooperative Corporation discloses medical information and criminal conduct because

[2] Although Plaintiff researched the issue, he has been unable to locate any case that discusses the disclosure of potentially criminal conduct. Likewise, Defendant has failed to cite anything on this issue besides blog posts from Plaintiff's counsel. However, Plaintiff assumes that a similar analysis would apply as under the CMIA since the privacy interests are similar and related.

Defendant "solely and exclusively offers medical cannabis treatment for serious illness." Opposition, at p. 7:8-9. But Defendant's argument is demonstrably wrong, because neither marijuana nor cannabis are listed in the PLPCC's name. If the notice administrator or someone finding a stray copy of the Notice were to connect the dots between the PLPCC and medical marijuana, the Notice only states that the person "may" have been a member. Motion P&A, at p. 3. And if the Court believes the Notice nonetheless contains sensitive information, it has discretion to revise it. *See e.g., Hernandez v. Vitamin Shoppe Indus. Inc.*, 174 Cal. App. 4th 1441, 1454-55 (2009) ("[Class] notice is a matter of extreme importance, committed to the discretion of the court, not the whim of litigants. The court must assure that the notice be neutral and objective in tone, neither promoting nor discouraging the assertion of claims. … It is the responsibility of the court as a neutral arbiter, and of the attorneys in their adversary capacity, to insure this type of free and unfettered decision.") (emphasis added) (internal quotations omitted).[3]

b. Procedural Safeguards Protect Class Member Privacy

In addition to the contents of the Notice, the Court is directed to consider *how the information will be used* to determine whether invasion of a privacy interest is sufficiently serious. *See e.g., Pioneer Electronics (USA) Inc. v. Sup. Ct.*, 40 Cal.4th 360, 373 (2007) (revealing names and addresses to class counsel "threatens no undue intrusion into one's personal life such as mass-marketing efforts or unsolicited sales pitches") citing *Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1, 36-37 (1994) ("The extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.")

Here, disclosure will occur to a notice administrator, the class members themselves, and if they fail to opt-out, to Plaintiff's counsel to aid in prosecution of their rights.

[3] Plaintiff is proposing essentially the same mechanism as will be used for class notice. If Defendant's argument has weight, how can a certified class ever be notified in this case? Will Defendants be able to preclude notice to class members because referencing *Point Loma Patients Consumer Cooperative Corporation* constitutes a serious invasion of privacy? Plaintiff has been unable to find any cases that would support such a loophole.

Plaintiff's counsel and the notice administrator will be bound by a stringent protective order that *only* allows confidential information – defined to include medical information – to be used for prosecution of this litigation. *See* RoA # 59 (Stipulated Protective Order). The California Supreme Court explicitly acknowledged that such prophylactics satisfy privacy concerns. *Hill*, 7 Cal.4th at 38 ("[I]f intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged.").

And because Plaintiff's counsel will be using the disclosed information to vindicate the rights of absent class members, after an opportunity to opt-out, there is no serious invasion of privacy. *See Belaire-West Landscape, Inc. v. Sup. Ct.*, 149 Cal. App. 4th 554, 561 (2007) (Absent class members can "reasonably be expected to want their information disclosed to a class action plaintiff who may ultimately recover for them [money] that they are owed.").

To summarize, the PLPCC has not identified an invasion of privacy that would outweigh Plaintiff's well established entitlement to contact members of the putative class after Notice and an opportunity to opt-out. Defendant's entire argument is an imaginary boogey man designed to frustrate Plaintiff's ability to effectively prosecute this case.[4]

II. DEFENDANT HAS FAILED TO IDENTIFY ANY "ABUSE" OF THE CLASS ACTION PROCEDURE

One of the only grounds to deny Plaintiff's Motion is a finding by the Court that such discovery would amount to an "abuse of the class action procedure." *See e.g.*, *CashCall, Inc. v. Sup. Ct.*, 159 Cal. App. 4th 273, 292 (2008) ("[A] trial court… 'must expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the

[4] Defendant's proposed changes to the Notice clearly demonstrate the PLPCC is not concerned with the privacy interests of absent class members. The PLPCC proposes that "any such notice should make clear that Plaintiff alleges each member of the putative class has engaged in criminal action and may be subject to incarceration, should their names and contact information be ordered released." Opposition at p. 10:9-11. But if simply mentioning the PLPCC is a serious invasion of privacy, Defendant's proposed changes are much worse. Defendant's proposed language is inflammatory, misleading, and subjects the recipient to embarrassment and intrusion into their private affairs.

danger of such abuses against the rights of the parties under the circumstances.'") citing *Parris v Sup. Ct.*, 109 Cal. App. 4th 285, 301 (2003).

But Defendant's Opposition is completely silent on potential abuses of the class action procedure. Of course there are none. The discovery Plaintiff requests is routine. The procedure Plaintiff proposes to safeguard class member privacy is also routine. Therefore there is no basis to deny Plaintiff's Motion.

However, even though not articulated as an abuse of the class action procedure, the PLPCC insists that this case is prosecuted by "shake-down class action counsel," who purportedly are "strictly interested in using [confidential information] as leverage in settlement demands." *See* Opposition at pp. 7:21 and 9:4-5.

Even if this were a valid argument – it is not – neither Plaintiff nor his counsel have *ever* made a money demand on Defendants. Declaration of William R. Restis ISO Reply to Motion to Compel Class Member List, ¶ 4. For more than two months after Plaintiff's initial records demand, the undersigned counsel attempted to negotiate review of Defendants' financials – *not* extract a settlement. *Id.*, ¶ 2.

Plaintiff's *only* settlement demand proposed that Defendants agree to an independent audit of their financial records to determine whether they wrongfully retained profits. *Id.*, Ex. A. The settlement proposal required Defendants to disgorge any profits identified by the audit and distribute them to member patrons of the PLPCC pursuant to the formula found in the Corporations Code. *Id.* If the audit revealed no wrongdoing, this dispute would be over. *Id.* Plaintiff made this proposal prior to filing the Complaint, and suggested it again a few days prior to the Court's ruling on Defendants' demurrer and Plaintiff's motion for appointment of an independent accountant. *Id.*, ¶ 5.

Thus, there is and never was a "shakedown" or any abuse of the class action procedure. Accordingly, the PLPCC's unprofessional briefing on this issue should be disregarded.

III. DEFENDANT HAS NOT WAIVED A RIGHT TO CHALLENGE PLAINTIFF BECK

As noted in Plaintiff's Motion, Defendant has previously asserted that Plaintiff has no "standing" to bring this lawsuit. Restis Decl., RoA # 52, Ex. E. In meet and confer, counsel stated that "*[t]o date*, Defendants have not asserted in this litigation that Beck is an improper or unsuitable class representative." *Id.*, Ex. J, at p. 2 (emphasis added). In other words, Defendants haven't *yet* made these arguments. However, the only time Defendants would raise this issue is in opposition to Plaintiff's forthcoming motion for class certification. Then it may be too late if a substitute class representative is necessary.[5]

And even if Defendants never challenged the adequacy of Plaintiff Beck, just last year the California Supreme Court reaffirmed that name and contact information of putative class members is "routinely discoverable as an essential prerequisite to effectively seeking group relief, without any requirement that the plaintiff first show good cause." *Williams*, 3 Cal.5th at 538.

IV. OPT-OUT NOTICE IS ADEQUATE TO PROTECT PRIVACY INTERESTS

Defendant asserts that if the Court approves Plaintiff's Motion, notice to absent class members should be opt-in, *i.e.,* require affirmative consent before their contact information can be provided to Plaintiff's counsel. Opposition, at p. 10:14-21. But like most arguments in PLPCC's brief, there is *zero* authority offered for this proposition. *See Berger v. California Ins. Guarantee Assn.*, 128 Cal. App. 4th 989, 1007 (2005) (argument forfeited where parties "fail[ed] to make a coherent argument or cite any authority to support their contention").

Defendant fails to cite any authority because the California Supreme Court routinely upholds pre-certification discovery of putative class member contact information provided they are given an opportunity to **opt-out** of disclosure. *See Pioneer*, 40 Cal.4th at 373 ("The Court of Appeal expressed the concern that the notice letters to be sent to Pioneer's complaining customers might never be

[5] In Plaintiff's Rule 3.724 meet and confer in advance of the case management conference, Plaintiff requested that Defendants stipulate to class certification, but they declined. RoA # 55, CM Statement, Ex. A, at p. 2 n. 1. Thus, Defendants are reserving this argument for class certification.

delivered and read. We believe this concern is misplaced, assuming the notice clearly and conspicuously explains how each customer might register an objection to disclosure."); *Williams*, 3 Cal. 5th at 555 ("As in *Pioneer Electronics*, there is no justification for concluding disclosure of contact information, after affording affected individuals the opportunity to opt out, would entail a serious invasion of privacy.")

In fact, given the abundance of case law, some courts have even held it is an abuse of discretion to order an *opt-in* procedure. *See Puerto v. Sup. Ct.*, 158 Cal. App. 4th 1242, 1259 (2008) ("We therefore hold that requiring petitioners to secure affirmative consent to the disclosure of their contact information via an opt-in letter mechanism exceeded the protections necessary to safeguard the legitimate privacy interests in the addresses and telephone numbers of the witnesses, and as such was an abuse of discretion.").

Thus, the Court can be confident in approving the opt-out procedure advocated by Plaintiff.

V. THE COURT SHOULD APPROVE PLAINTIFF'S NOTICE

After admitting that it refused to meet and confer, Defendant argues the Court cannot approve Plaintiff's proposed Notice because "*all Defendants,* not just PLPCC … should have the right to review and weigh in on a proposed notice." Opposition, at pp. 9:27-10:3 (emphasis in original). But all Defendants are represented by the same two firms, who were provided multiple drafts of Plaintiff's proposed Notice and asked for comment. *See* Restis Decl., Exs. H and K. They declined.

In addition, the PLPCC had an opportunity – on behalf of itself or the other Defendants – to provide substantive input on the Notice when filing their Opposition. But no opposing notice was submitted, and no serious input was provided for the Court's consideration. Instead, the PLPCC spuriously argues that

> Substantively, any such notice should make clear that Plaintiff alleges each member of the putative class has engaged in criminal action and may be subject to incarceration, should their names and contact information be ordered released and "make its way into the public record" as Plaintiff has asserted in this case. Plaintiff's proposed notice has no such language warning the individuals of such dire potential

consequences.

Opposition at p. 10:9-11.

But as stated above, Defendant's proposed changes do not comport with protecting the privacy rights of absent class members because it connects their name and address with supposed criminal activity. In other words, Defendant is not concerned with protecting absent class members, just obstruction and delay.[6]

Conversely, Plaintiff's proposed Notice is unbiased, neutral, and protects absent class member privacy. And if the Court believes the Notice is defective in any particular, it has the discretion to modify it. *See e.g., Hernandez.*, 174 Cal. App. 4th at 1454-55 ("[Class] notice is a matter of extreme importance, committed to the discretion of the court, not the whim of litigants.")

VI. PLAINTIFF'S MEMORANDUM COMPLIED WITH THE RULES OF COURT

Defendant asserts Plaintiff's Motion should be denied because it purportedly did not include a Separate Statement. Opposition, § II. But the PLPCC is factually and legally incorrect because Plaintiff's combined Points and Authorities and Separate Statement fully comply with Rule of Court 3.1345.

First, Plaintiff's combined document is a "separate document filed and served with the discovery motion." *Id.* Defendant has not identified, and Plaintiff has not found any case stating that the Separate Statement must be separate from the Points and Authorities, only the *Motion.* Here, Plaintiff's Motion was filed as RoA Number 50. The combined P&A and Separate Statement was filed *separately* as RoA Number 51. Thus it was separate from the Motion and complies with the

[6] Courts often express skepticism over defendants' feigned concern for absent class members, because the real goal is "not to be successfully sued by anyone." *In re Diasonics Sec. Litig.*, 599 F.Supp. 447, 451-452 (N.D. Cal. 1984). Instead, "it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house." *Id.*, citing *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981), *cert. denied* 455 U.S. 1017 (1982).

Rule. The cases cited by the PLPCC do not hold otherwise.[7]

Second, the *contents* of Plaintiff's combined P&A and Separate Statement fully comply with Rule of Court 3.1345(c). The Separate Statement must contain

> all the information necessary to understand each discovery request and all the responses to it that are at issue. The separate statement must be full and complete so that no person is required to review any other document in order to determine the full request and the full response. Material must not be incorporated into the separate statement by reference.

Id. Plaintiff included all such information so that the document was complete in and of itself, making sure to include all the specific information enumerated in Rule 3.1345(c)(1)-(c)(6).

Thus, Plaintiff's Motion is procedurally proper, and was filed as such to avoid duplicative briefing because the Separate Statement and Points and Authorities would have been *identical* in this instance. Defendant's legally incorrect nit-picking should be rejected.

VI. CONCLUSION

For the reasons stated above, the Court should order the PLPCC to provide the names and addresses of absent class members to a third party administrator for disclosure to Plaintiff's counsel after an opt-out period, and for the Court to approve Plaintiff's Notice.

Respectfully submitted,

DATED: March 16, 2018

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[7] *See Neary v. Regents of Univ. of Cal.*, 185 Cal. App. 3d 1136, 1145 (1986) ("At the hearing the trial court explained that it needed to have this separate listing of the information sought and the reasons the information was relevant in order to rule appropriately as to each question. If plaintiff was disadvantaged by his own failure to adequately support his motions to compel discovery, he cannot claim that the trial court erred in refusing to delay its ruling on the summary judgment motion.").

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