UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

PAUL GAGNON, individually and through class representation on behalf of a class consisting of all other similarly situated owner-operators,

Plaintiff,

v.

Case No. 5:02-cv-342-Oc-10GRJ

SERVICE TRUCKING INC., a Florida corporation,

Defendant.

ORDER

Pending before the Court is Plaintiff's Motion To Limit Defendant's Communications With Plaintiff And Potential Class Members And Requiring Defendant To Provide Curative Notice To Class Members (Doc. 3) to which Defendant filed a Response Memorandum. (Doc. 16.) On January 23, 2003 the Court held a hearing on Plaintiff's motion. At the conclusion of the hearing the Court instructed the parties to submit to the Court an agreed notice to be given to Owner-Operators, or in the event the parties were unable to agree on the language in the notice, to submit unilateral forms of notice. The parties each have submitted a proposed notice and, accordingly, the matter is now ripe for resolution. For the reasons discussed at the hearing, and as discussed below, Plaintiff's Motion To Limit Defendant's Communications (Doc. 3) is **GRANTED** to the limited extent specified in this order.

I. INTRODUCTION AND BACKGROUND

The Defendant, Service Trucking, Inc. ("Service Trucking"), is engaged in interstate and intrastate trucking. Service Trucking utilizes the services of independent contractors (the "Owner-Operators"), who operate their trucks pursuant to an Independent Contractor Operating Agreement (the "Lease Agreement"). The Plaintiff in this case - and the individuals identified as potential class members - are all individuals who operate their trucks with Service Trucking under the Lease Agreement. The claims in this case relate to various disputes between the Owner-Operators and Service Trucking concerning the calculation of compensation paid to the Owner-Operators, the collection, use and payment of interest on escrow funds collected by Service Trucking, the payment of various state fuel tax credits and the deduction of fuel card discounts, transaction fees, workers compensation charges, advance charges, accounting fees and other charges. According to Plaintiff, Service Trucking is violating Federal Truth in Leasing Laws, and engaging in deceptive and unfair trade practices by improperly deducting these charges from the compensation of the Owner-Operators or failing to provide proper notice or grant required credits to the Owner-Operators.

The case has been re-designated as a track three case. Although the case is styled as a class action, the case has not, as yet, been certified as a class action.[1] The matter presently pending before the Court concerns Plaintiff's request that the

[1] The deadline for filing Plaintiff's brief in support of class certification is April 1, 2003.

Court limit communications by Defendant with the Owner-Operators and Plaintiff's request that the Court enter an order directing the Defendant to provide a curative notice to the Owner-Operators.

In support of Plaintiff's request to limit communications, Plaintiff relies upon two documents prepared by Service Trucking and presented to the Owner-Operators. The first document is entitled "Exhibit A Independent Contractor Agreement Required Items" ("Exhibit "A"), a copy of which is attached to the affidavit of Plaintiff.[2] Essentially, Exhibit A, details the deductions Service Trucking will be making from the compensation paid to the Owner-Operators under the Lease Agreement and provides that the Owner-Operators agree to the deductions and charges. Notably, Exhibit "A", was prepared and given to Owner-Operators after this lawsuit was filed.

The second document relied upon by Plaintiff is a new and revised "Independent Contractor Agreement" (the "Revised Agreement"),[3] which was presented to the Owner-Operators in December, 2002 - after Plaintiff's motion was filed. The Revised Agreement was presented by Service Trucking to Owner-Operators for renewal, and according to Service Trucking, has been executed by approximately fifty Owner-Operators. Although, the Revised Agreement contains twenty-six revised and very detailed provisions, the only provision relevant to the

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[2] Doc. 5, Ex. "B".

[3] Doc. 18, Ex. "B".

Court's inquiry is paragraph 26, which provides for a full, complete and unconditional release of all claims the Owner-Operator has against Service Trucking. During the hearing, counsel for Service Trucking readily conceded that the release language in paragraph 26, was broad enough to release all of the claims that any Owner-Operator has raised or could raise in this lawsuit. Thus, paragraph 26 of the Revised Agreement would limit the rights of any Owner-Operator, who executed the Revised Agreement, to sue Service Trucking or to participate as a class member if class certification was to be granted.

Therefore, the Court must address whether Service Trucking's actions in presenting either of the agreements to the Owner-Operators constitutes an improper communication and, if so, what curative notice, if any, should be implemented.

II. DISCUSSION

The guiding principles for no-contact orders, in class actions, were established by the Supreme Court in Gulf Oil Co. v. Bernard.[4] In Gulf Oil, the Supreme Court instructed that orders limiting communications by a defendant and members of a class should only be entered based on "a clear record and specific findings that reflect the weighing of a need for limitation and the potential interference with the rights of the parties."[5] While Gulf Oil, dealt with

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[4] 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981).

[5] 452 U.S. at 101, 101 S.Ct. at 2193

communications in a case where the class had been conditionally certified, these same principles are applicable, as here, in a complex case where the issue of class certification is pending before the Court. There is no question that district courts have wide latitude in managing complex litigation in general and class actions in particular.[6] This fact is recognized in the Manual For Complex Litigation, which provides in relevant part that "the court should not restrict communications between the parties or their counsel and actual or *potential* class members, except when justified to prevent serious misconduct."[7] Further, because the Owner-Operators and Service Trucking "[a]re involved in an ongoing business relationship, communications from the class opponent [Service Trucking] to the class may be coercive."[8]

With these principles in mind, the Court will address whether the use of either Exhibit A or the use of the Revised Agreement constitutes serious misconduct because of the unilateral manner in which the documents are presented to the Owner-Operators. In addressing the use of these documents, however, it must be borne in mind that the Defendant is entitled to proceed with the conduct of its business as it sees fit, so long as its actions do not unfairly jeopardize the

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[6] Gates v. Cook, 234 F.3d 221, 227 (5th Cir. 2000).

[7] Manual for Complex Litigation, Third (1995) § 30.24.

[8] Kleiner v. First National Bank of Atlanta, 751 F.2d 1193, 1202 (11th Cir. 1985).

legal rights that the Owner-Operators may have with regard to their participation or potential participation in this lawsuit.

1. Use of Exhibit "A"

Turning to the first document - Exhibit A - the primary focus of Plaintiff's challenge relates to whether the document is designed to operate as a release of the specific claims in this case. If it does operate as a release, consistent with Gulf Oil, the Court would need to weigh the need for a limitation and the potential interference with the rights of the parties. For at least several reasons, the Court concludes that the use of Exhibit A does not evidence any misconduct on the part of Service Trucking and thus does not implicate the use of a no-contact order or any curative notice.

A simple review of Exhibit A discloses that there is nothing in the language of the document which suggests that execution of the document would release any rights that an Owner-Operator may have. This fact is further supported by Service Trucking's statement in its response papers (and its position repeated at the hearing), that "Service Trucking has not alleged, and will not argue in the future, that Plaintiff or any other independent contractor released any claims against Service Trucking by execution of any document similar to Exhibit "A" after the filing of this lawsuit."[9] Thus, in view of this representation by Service Trucking,

[9] Doc. 16, p. 3.

there is simply no dispute that Exhibit A does not and will not be construed to release any claims that potential class members may have had.

Moreover, the Owner-Operators, who did execute Exhibit A, only did so after executing an addendum, which expressly provides that the execution of the document is not intended to operate as a release of any claims or damages in this case.[10] Therefore, even if Service Trucking had not agreed that Exhibit A does not release any claims, by signing an addendum, Plaintiff has removed any suggestion that the parties intended to release the claims in this case through the execution of the document.

Although, Exhibit A by its nature is designed to address issues relating to the deductions in issue in this case, it is remedial in nature and, thus, does not impact existing rights and claims. While the document ultimately may be designed to address problems raised by Plaintiff in this case concerning deductions under the Independent Contractor Agreement, Service Trucking has a legitimate business interest in addressing the "deductions" and attempting to remedy any problems that might exist. Those efforts do not impact the ability of Owner-Operators to participate as a class or their ability to prosecute such claims on their own if they so choose.

Lastly, Plaintiff contends, separate from the content of Exhibit "A," that Service Trucking required the Owners-Operators to meet with one of Defendant's

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[10] *See,* Doc. 5, Ex. "B".

Vice-Presidents before Service Trucking would authorize any further work for the Owner-Operators. During this meeting, Service Trucking required the Owner-Operators to sign Exhibit A and represented that if they did not sign the document, Service Trucking would not allow the Owner-Operators to continue to drive for them. Even accepting these allegations as true, the Court finds that this conduct does not establish a compelling reason for the Court to limit communications or for the Court to direct that a curative notice be given.

Service Trucking is entitled to do business with whomever it wishes, subject of course to any contractual commitments it may have with the Owner-Operators. Indeed, if there is any impropriety with regard to the termination or threatened termination of a business relationship between any Owner-Operator and Service Trucking, the conduct may be relevant to claims of retaliation, but the conduct is not relevant to whether the Court should limit communications between Service Trucking and the Owner-Operators. The only way in which the communications would be relevant would be if Service Trucking intentionally and deliberately provided materially false and misleading information to the Owner-Operators in an effort to either persuade the Owner-Operators not to participate in any potential class or unilaterally to force the Owner-Operators to extinguish claims they have against Service Trucking. There is no evidence in the affidavits submitted by Plaintiff - and there was no suggestion by Plaintiff's counsel in his proffer to the Court during the hearing - that Service Trucking representatives said or did anything

misleading at the meeting with Plaintiff or in any other manner with regard to the execution of Exhibit A.

Accordingly, for these reasons, the Court finds that Plaintiff has failed to establish specific conduct of Service Trucking with regard to the execution of Exhibit A, that would necessitate the entry of either an order limiting contact with the Owner-Operators or the entry of a curative order with regard to Exhibit A.

2. The Revised Agreement

Neither party addressed the execution of the Revised Agreement in their briefs but instead the matter was raised for the first time at the hearing. According to counsel for Service Trucking, near the end of December, when leases with some of the Owner-Operators were due to expire, Service Trucking prepared and presented for signature to approximately fifty Owner-Operators, the Revised Agreement. The Revised Agreement contains a number of detailed and material changes to the prior Independent Contractor Agreement. The one provision of the Revised Agreement relevant to the Court's inquiry on the present motion is the release clause in paragraph 26. There is no dispute that the language in paragraph 26, if given effect, would forever release and discharge any claims that an Owner-Operator may have against Service Trucking, including any claims raised in this case.

According to Plaintiff, on or about December 19, 2002 Service Trucking posted an office memorandum addressed to all Owner-Operators at Defendant's

place of business in Eustis, Florida that advised the Owner-Operators that their current leases were due to expire on December 31, 2002 and that a new lease, with changes, needed to be signed because "[T]hese changes in our lease are required by our government."[11] The memorandum goes on to state that "[W]e do not believe that the government should dictate the terms of our contract, but we must stay in compliance with the law."[12] The memorandum does not mention that the Revised Agreement contains a release that would release all claims relevant to this case nor does it suggest or explain why the "government" requires these changes in the lease. There is no allegation that Service Trucking made any other representations - one way or the other - concerning the execution of the Revised Agreements by the Owner-Operators.

According to Defendant, the purpose of the memorandum "was to remind all owner operators that their lease agreements were due to expire on December 31, 2002 as well as to advise them that a new lease would be required."[13] Further, Service Trucking contends that the memorandum was not intended to infer that paragraph 26 of the Revised Agreement was required by law.[14] Lastly, Service

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[11] Doc. 18, Ex. A.

[12] *Id.*

[13] *See,* affidavit of Daniel L. Baugh, Doc.21, ¶5.

[14] *Id.* at ¶7.

Trucking asserts that "not one of those owner operators who signed the new lease agreement questioned or objected to paragraph 26."[15]

While the Court recognizes that Service Trucking is entitled to renew its leases, and to continue to do business with the Owner-Operators under new contractual terms, inclusion of the release language in paragraph 26 is highly problematic. Certainly, standing alone, it would be improper to solicit releases from potential class members in order to limit the potential number of participants in the class.[16] Notwithstanding the assertions by Service Trucking that the Owner-Operators were not led to believe that the release clause was mandated by the government, common sense dictates that the reason Service Trucking insisted that the Owner-Operators sign new leases with the release language in paragraph 26 was to prevent Owner-Operators from participating in the class action. Service Trucking does not dispute that in their view any Owner-Operator who executes the Revised Agreement forever discharges and extinguishes any claims which could be

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[15] *Id.* In addition, to this statement in the affidavit of Daniel Baugh, Service Trucking filed nine identical affidavits of Owner-Operators, all averring that they never thought the release language in paragraph 26 was required by law. *See,* ¶¶ 7 in Docs. 25, 26, 27, 28, 29, 30, 31, 32, and 33. Because these affidavits were filed on the date of the hearing, and thus Plaintiff did not have a fair opportunity to review and respond to them, the Court struck these affidavits. However, even if the affidavits were considered by the Court they do not impact the Court's findings in this matter because none of the affidavits suggest that the Owner-Operators were alerted in any manner whatsoever that execution of the Revised Agreement would extinguish their claims against Service Trucking.

[16] *See, e.g.* Kleiner, 751 F.2d 1193 (solicitation of exclusion requests from potential class members held to be improper); In re International House of Pancakes Franchise Litigation, 1972 WL 535 (W.D. Mo.)(prohibiting franchise holder from negotiating repurchase agreements with class members that includes a full and general release of the franchisee's claims in the class action); Impervious Paint Industries, Inc. v. Ashland Oil, 508 F.Supp. 720 (W.D. Ky. 1981).

brought in this case by an Owner-Operator and their right to participate in this case, if the Court was to grant Plaintiff's request for class certification.

The situation is further compounded by the fact that the Defendant and the Owner-Operators are involved in an ongoing business relationship in which the Owner-Operators depend upon Service Trucking for continued business. Due to the fact that the Owner-Operators must necessarily rely upon Service Trucking for their livelihood and as a source of information, the Owner-Operators are susceptible to the information disseminated by Service Trucking. The use of this relationship in conjunction with the misleading representation that the "government" mandates that the Owner-Operators sign new leases, renders the practice of insisting that Owner-Operators release their claims, improper, thus, necessitating that the Court intervene to regulate future contacts concerning the release in paragraph 26 of the Revised Agreement.

Consistent with Gulf Oil the Court must strike a balance between protecting potential class members from making one-sided decisions that would extinguish all of their claims, while at the same time taking care not to interfere with the on-going business relationship between the Owner-Operators and Service Trucking. With this in mind the Court determines that Service Trucking shall be required to present the written notice set forth below to all Owner-Operators before the Revised Agreement is presented to them for execution. This directive shall be effective from the date of this Order until the conclusion of this action, or in the

event class certification is denied, until such order becomes final and non-appealable. Further, until either class certification is denied, or if granted, until the conclusion of this case, the Defendant shall also be prohibited from presenting to any Owner-Operator any other form of general release, separate from contracts incident to the continuation or conduct of their business relationship, the effect of which would be to extinguish the claims raised in this case. With regard to those Owner-Operators, who already have executed the Revised Agreement, the Court determines that the explanatory notice mandated in this Order, would be meaningless in view of the fact that the contract has already been executed. The Court expressly is not deciding the issue, however, of whether an Owner-Operator who executed the Revised Agreement may participate in a class action in this case if a class is certified, in view of the fact that the issue has not been squarely presented to the Court and would involve an inquiry into the particular circumstances surrounding the execution of the Revised Agreement by the Owner-Operator. That issue will be left for another day in the event a class is certified.[17]

The notice to be provided to all Owner-Operators before the Revised Agreement is presented shall be substantially in the following form:

> **THIS AGREEMENT CONTAINS IMPORTANT RIGHTS AND WILL RELEASE AND DISCHARGE ANY CLAIMS WHICH YOU MAY HAVE AGAINST SERVICE TRUCKING, INC., INCLUDING ANY**

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[17] Upon a proper showing the Court could set aside the effect of the release in paragraph 26. *See, e.g.* Impervious Paint, 508 F.Supp. at 723-24 (permitting class members who opted out based on improper contacts by defendant to be restored to class and to make a new decision as to whether they wished to opt-out.)

CLAIMS YOU MAY HAVE AS A POTENTIAL CLASS MEMBER IN THAT CERTAIN CASE STYLED GAGNON V. SERVICE TRUCKING, INC., CASE NO. 5:02-CV-342-OC-10GRJ, PENDING IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. (the "Lawsuit")

Prior to signing this Agreement, you should review and understand the entire Agreement, including the language contained in Paragraph 26. **You should consider consulting with an attorney prior to entering into this Agreement** and if you elect to do so, you will not be required to sign this Agreement before you have had a chance to consult with an attorney.

Paragraph 26 contains language that will serve to release claims you may have against Service Trucking and will limit your right to participate in the Lawsuit. Specifically, if you choose to sign this Agreement, you will be waiving any right you may have to file a claim against Service Trucking concerning matters that occurred prior to the date of this Agreement. These claims include, but are not limited to, any claim involving deductions from your settlements. Further, you should be aware that you are not required by any government or governmental agency to release your claims against Service Trucking as a condition to continuing to do business with Service Trucking under this Agreement.

Your signature below signifies that you have read and understand the entire Agreement, including Paragraph 26 and that you have consulted with an attorney, or if you elect not to do so, that your decision not to consult with an attorney has been made knowingly and that you understand the rights you are waiving.

Date: _____ _____

Owner-Operator

This notice shall be presented to all Owner-Operators, who had prior contractual agreements with Service Trucking but who have not already executed a

Revised Agreement. Nothing in this Order shall limit, impair or effect in any manner the right of Service Trucking to continue to communicate with and continue to have contact with Owner-Operators in the normal conduct of Defendant's business.

IT IS SO ORDERED.

DONE AND ORDERED in Ocala, Florida, on this 4th day of February, 2003.

GARY R. JONES
United States Magistrate Judge

Copies to:
All Counsel