SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/19/2013 TIME: 10:00:00 AM DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager
CLERK: Jay Browder
REPORTER/ERM: Laura Bollschweiler CSR# 10500
BAILIFF/COURT ATTENDANT: Lynn Wilks

CASE NO: **37-2011-00102593-CU-OE-CTL** CASE INIT.DATE: 12/16/2011
CASE TITLE: **Felczer vs. Apple Inc [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES
Tyler J Belong, counsel, present for Plaintiff(s).
Jeffrey L Hogue, counsel, present for Plaintiff(s).
Julia Collins Riechert, counsel, present for Defendant(s).
Julie A Dunne, counsel, present for Defendant(s).

The Court hears oral argument and confirms with modification, in bold type, the tentative ruling as follows:

The Court rules on Defendant Apple Inc.'s ("Apple") Motion to Quash Subpoena as follows:

As a preliminary matter, under the hearsay rule the demand letter written by Devon Roepcke cannot be used as proof that Apple attempted to make Husain "Skip" Jafry ("Mr. Jafry") sign untrue declarations. The letter only demonstrates that Mr. Jafry's lawyer accused Apple of doing so.

Plaintiffs Brandon Felczer et al. (collectively "Plaintiffs") brought this suit on behalf of themselves and others similarly situated against Apple. Plaintiffs seek to recover for Apple's failure to provide meal periods, failure to provide rest periods, failure to comply with California paycheck requirements, and failure to pay wages on the end of employment.

Mr. Jafry is a non-party witness in the present action. Mr. Jafry filed an individual claim against Apple and the parties settled their dispute. Plaintiffs issued a subpoena seeking the draft settlement agreements.

As discussed below, the subpoena impermissibly intrudes on the privacy of a third-party settlement agreement. Thus, Apple's motion to quash the subpoena is GRANTED **without prejudice to renew after all reasonable means to detemine the truth of the matter are exhausted.**

The court notes that the subpoena requested "any and all settlement agreements between Skip Jafry and Apple, Inc., including all prior drafts and correspondence relating to the same." Plaintiffs state that they agreed to withdraw the Subpoena for the correspondence and Apple agreed to produce the final settlement agreement signed by Mr. Jafry, and as such "the motion has been boiled down to whether unsigned draft settlement agreements are discoverable." In Apple's Reply, Apple states that they offered to produce the final settlement agreement for the limited purpose of showing that Mr. Jafry released all his claims against Apple, but that Plaintiffs rejected this offer.

As Plaintiffs limited their demand in the Opposition to the unsigned draft settlement agreements, this Court will analyze their argument on those terms. Regardless, because the motion is granted the limiting of the request does not affect the outcome.

A. Evidence Code section 1152

Apple first argues that the draft settlement agreements are protected under Evidence Code section 1152 ("Section 1152"). "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, *as well as any conduct or statements made in negotiation thereof*, is inadmissible to prove his or her liability for the loss or damage or any part of it." (Evid. Code, § 1152(a) (emphasis added).) Even though the Plaintiff requests unsigned draft agreements, these are negotiations related to the settlement agreement and included in Section 1152.

However, "[w]hile evidence of a settlement agreement is inadmissible to prove liability (see Evid.Code, § 1152), it is admissible to show bias or prejudice of an adverse party." (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126.) Additionally, "such evidence may be admissible to show bias or prejudice of an adverse witness, or, in a proper case, may be used to rehabilitate a witness." (*Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d 716, 729.)

In this case, Plaintiffs seek to use the settlement agreement and negotiations not to prove Apple's liability but to establish the credibility of Mr. Jafry and call into question the credibility of the depositions obtained by Apple.

As such, Section 1152 subd. (a) does not, by itself, bar the discovery of the draft settlement agreements.

B. Third-Party Privacy Interest

"The privacy of a settlement is generally understood and accepted in our legal system, which favors settlement and therefore supports attendant needs for confidentiality." *(Hinshaw, Winkler, Draa, Marsh & Still* (1996) 51 Cal.App.4th 233, 241 (hereafter "*Hinshaw*").) "[C]ourts have recognized that 'the purpose of section 1152 [is] to promote candor in settlement negotiation.' " (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 32.) "[T]he obvious policy of the statute is to avoid deterring parties from making offers of settlement and to facilitate candid discussion which may lead to settlement of disputes. Negotiations might well be discouraged if a party knew that statements made by him (or his failure to make certain statements) might later be used to prove the invalidity of some other claim which he wished to assert." (*Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.* (1969) 276 Cal.App.2d 770, 773.)

Mr. Jafry was an individual litigant against Apple. When the dispute arose, Mr. Jafry could (1) reach a mutual agreement resolving the issue with Apple; (2) pursue his claim individually; or (3) pursue his

claims through this class action. Mr. Jafry chose to reach a mutual agreement with Apple to resolve the issue. This private settlement does not, and never did, involve the Plaintiffs in this case and is therefore given the extra privacy protections provided to third-party settlement agreements.

In *Hinshaw*, Physicians who sued an HMO brought a malpractice action against their attorneys and sought discovery concerning settlement agreements brought against same HMO by different group of physicians. ." (*Hinshaw, supra,* 51 Cal.App.4th at p. 233.) The court distinguished *Hinshaw* from prior precedent in which "*no third party privacy interests were involved.*" (*Id.* at p. 238.) (italics in original) The court held that when seeking the production of third party settlement agreements "the burden rests on the proponents of discovery of this information . . . to justify compelling production of this material. They must do more than show the possibility it may lead to relevant information. Instead they must show a compelling and opposing state interest." (*Id. at p.* 239.)

The "compelling need must be so strong as to outweigh the privacy right when these two compelling interests are carefully balanced." (*Save Open Space Santa Monica Mountains v. Super. Ct.* (2000) 84 Cal.App.4th 235, 252.) In this case, the parties' privacy interests in keeping their settlement proceedings secret must be weighed against the Plaintiffs' need for the discovery, the state's interest in enforcing labor laws, and the state's interest in "facilitating the ascertainment of truth in connection with legal proceedings." (*Hinshaw, supra,* 51 Cal.App.4th at p. 239.)

The Plaintiffs' interests are not compelling.

Plaintiffs assert that discovery of prior drafts of settlement agreements and associated correspondence will lead to evidence that Apple attempted to pressure Mr. Jafry to sign an agreement that (1) retracted his claims that Apple harassed and pressured him to sign agreements and that Apple retaliated against him for cooperating with the class action; (2) prohibited Mr. Jafry from helping assisting the class action; and (3) represented that he has not signed any declarations in the instant action. Plaintiffs state that they have reliable information that Mr. Jafry refused to sign agreements containing these clauses.

Plaintiffs assert that these proposed clauses demonstrate how Apple attempts to muzzle its non-exempt employees; the great lengths that Apple has gone to try to discredit Mr. Jafry; and the lack of credibility of any statements or declarations submitted by Apple, considering the methods it employs to obtain favorable statements.

However, Plaintiffs' stated need is not compelling. First, the draft settlement documents were exchanged between Orick, the law firm representing Apple, and Mr. Roepke, the attorney representing Mr. Jafry. The documents do not reflect any communication between Apple and Mr. Jafry himself. Second, Plaintiffs offer no evidence that Mr. Jafry ever saw the documents or felt harassed by Apple's settlement proposals. Third, Mr. Jafry signed his declaration on November 14, 2012 and sent the demand letter on December 31, 2012. This demand letter led to the settlement negotiations. The draft settlement documents could not have been what pressured Mr. Jafry into signing his declaration.

Plaintiffs argue that the evidence is necessary to restore Mr. Jafry's credibility because Apple accused him of perjury. But Apple only accused Mr. Jafry of perjury because the Plaintiffs' attorneys represented that Mr. Jafry had voluntarily cooperated with the class action lawsuit, contrary to what he stated in his declaration. As the Plaintiffs confirm that the declaration of Mr. Jafry filed by Apple is the only declaration that exists, the perjury accusation is irrelevant.

In addition, Plaintiffs' requested discovery is not essential to their lawsuit. "When the information sought

'... is essential to the fair resolution of the lawsuit, a trial court may properly compel such disclosure.' " *(Planned Parenthood Golden Gate v. Super. Ct.* (2000) 83 Cal.App.4th 347, 367.) In this case, Plaintiffs' causes of action are based on Apple allegedly denying employees' lunch and rest breaks. The alleged need for the settlement agreement does not include any evidence that Apple did or did not provide these breaks.

The State's interests do not outweigh the privacy of Mr. Jafry's settlement agreement.

The state has an interest in "facilitating the ascertainment of truth in connection with legal proceedings." (*Hinshaw, supra,* 51 Cal.App.4th at p. 239.) Plaintiffs contend that the draft settlement agreements will demonstrate that Apple attempts to improperly control witness testimony and therefore prohibit the ascertainment of truth in these proceedings. But as stated above, Plaintiff does not provide compelling justification that these draft settlement agreements will show that Apple is harassing employees to behave untruthfully.

Plaintiffs' claim involves the enforcement of the Labor Code, which codifies public interests. (See *Gentry* v. *Super. Ct.* (2007) 42 Cal.4th 443, 455-456.) As such, it is in the public's interest to determine whether the witness statements are credible in order to enforce the Labor Code. But the request for the draft settlement agreements is not essential to the resolution of the Labor Code claims.

C. Plaintiffs have less invasive means of securing the information they seek.

Plaintiffs must prove there is no less-intrusive means to obtain the information they are seeking in order to gain access to confidential settlement communications. (*El Dorado Savings & Loan Assn. v. Super. Ct.* (1987) 190 Cal.App.3d 342, 346.) Plaintiffs offered no reason why they cannot depose Mr. Jafry to ask him if Apple harassed him into participating in the defense of this matter. This declaration would not impinge on Apple's privacy right, and would yield evidence that would provide the Court with the benefit of first-hand testimony.

IT IS SO ORDERED.

Ronald S. Prager

Judge Ronald S. Prager