THE HONORABLE AIMÉE SUTTON
Noted for Hearing: March 29, 2019 at 11:00 a.m.
Oral Argument Requested

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

KRIS HARDIE, individually and on behalf of all others similarly situated, Plaintiff, v. BEST PARKING LOT CLEANING INC., a Washington Corporation, Defendant.	No. 17-2-27730-4 KNT PLAINTIFF'S MOTION FOR CURATIVE RELIEF UNDER CR 23(d)(2)-(3)

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff confirmed that Best Parking Lot Cleaning Inc. ("BPLC" or "Defendant") has inappropriately interfered with the administration of this class action. The below evidence shows BPLC has exerted undue influence over Class members to obtain opt-outs in this litigation and otherwise act in the interests of Defendant to their own detriment.

"The potential abuses of the class action process include . . . exertion of undue influence on class members to opt out, and misrepresentations creating false impressions of the action

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

and the court's rule." *Darling v. Champion Home Builders Co.*, 96 Wash. 2d 701, 706, 638 P.2d 1249, 1252 (1982). This Court must take action to protect the Class of vulnerable employees:

> If improper communications occur, curative action might be necessary, such as . . . voiding improperly solicited opt outs and providing a new opportunity to opt out. Other sanctions may be justified, such as . . . contempt and fines, [and] assessment of fees . . . .

Ann. Manual Complex Lit. ("MCL") § 21.33 (4th ed.).

Defendant's efforts began prior to class certification, when BPLC solicited and/or coerced dozens of proposed Class members into providing false declarations opposing class certification. After this Court certified the Class, BPLC and/or its agents then solicited, encouraged, and coerced Class members to opt-out of the litigation.

The evidence presented in support of this motion shows that BPLC has intimidated employees to act against their own interests in relation to this case. Plaintiff believes this will continue absent intervention by this Court. Specifically, Plaintiff respectfully requests the Court:

- Prohibit Defendant and its agents from communicating Class members regarding the lawsuit;
- Order Defendant and its managers to direct any inquiries by Class members about the lawsuit to Class counsel;
- Provide Class counsel with the opportunity to conduct additional depositions and discovery to investigate whether Class members knowingly and voluntarily submitted opt outs;
- Issue a curative notice to be disseminated to all Class members; and,
- Order the Class members who have opted out to reaffirm that decision and prohibit BPLC (but not defense counsel) from learning who does or does not opt out because such disclosure may lead to retaliation against those who choose not to opt out.

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

II. STATEMENT OF FACTS

A. Defendant Discouraged Class Members from Pursuing Their Legal Rights at Issue to the Benefit of Defendant.

Defendant has actively secured false statements from Class members related to their taking rest and meal breaks. *See* Declaration of Kevin Shearon, submitted herewith; Dkt. No. 54 (Gabriel Chadderton) ⁋⁋9-10. According to Class members Kevin Shearon and Gabriel Chadderton, Defendant's officer Rich Hamilton directed them to sign false statements affirming they had taken their meal and rest breaks, when they had not. *Id*. Mr. Hamilton told them the statements were related to a "new protocol," and they signed them because they felt compelled. *See id*. They were not informed the statements were related to this lawsuit. *Id*.

Before class certification, BPLC submitted 50 similarly-worded declarations from class members in opposition to class certification. Declaration of Daniel Cairns ("Cairns Decl."), Ex. 1. Of these 50, 46 were signed by current, at-will employees, with 19 explicitly affirming they were asked to sign the declarations. *Id.* All but three declarations identified they were signed at or near Defendant's location. *Id*. Every declaration was dated from November 16-20, 2018. *Id*. Approximately 40 declarations affirmed that BPLC did not owe the declarant money, yet they only addressed rest and meal breaks. *Id*. Indeed, only one addressed overtime and one other addressing pre-op and post-op pay. *Id*. Zero declarations addressed whether their travel time was paid at the prevailing wage rate. *Id*.

Class counsel recently deposed three former Class members who have just opted out. Mr. Hamilton and Mr. Craig were present for all three depositions. Their deposition testimony confirms their prior declarations were false.

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

Mr. Adrian Nelms testified that when he signed the declaration he had not reviewed it and instead believed it had something to do with Mr. Hardie. He testified that he had never seen the exhibits attached to his declaration. He testified he never provided Ms. Craig with any hand written notes about this lawsuit, which contradicts his declaration.

Mr. Morgan Bell also testified that when he signed the declaration he had not reviewed it and likewise believed it had something to do with Mr. Hardie. He testified that he had never seen at least one of the exhibits attached to his declaration. He believed he was signing the declaration to opt-out of the lawsuit. He believed the lawsuit was only about meal and rest breaks. He testified he did not know that the declaration or his email would be submitted to the Court which contradicts the declaration itself.

Mr. Riddle testified he had never spoken to anyone about the lawsuit, and specifically denied ever speaking to Ms. Craig which contradicts his declaration. Declaration of Hardeep S. Rekhi Declaration. ¶ 11, Ex. 6. Mr. Riddle also testified that prior to signing his declaration he had reviewed the class notice, but this is impossible as the notice was not drafted until months after he signed the declaration. Rekhi Decl. ¶ 11. He also testified that he had never sent an email to Ms. Craig relating to the lawsuit, which is contradicted by his declaration.

Defendant also used their power as an employer to discourage participation in the litigation. Declarants confirmed that they signed declarations at Defendant's office while clocked in. Cairns Decl. ¶ 4. That is, they were being paid to sign the declarations. Ms. Craig testified that Defendant discussed this lawsuit since at least February 2018 at monthly "safety meetings" that currently employed Class members were required to attend. Dkt. No. 139; Cairns Decl., Ex. 2 at 70:4-6, 78:17-24. According to a former employee, Jedidiah Wilson, Ms.

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

Craig regularly initiated discussing the lawsuit at these meetings. Declaration of Jedidiah Wilson ¶15 (submitted herewith). According to Mr. Wilson, at the December 2018 meeting, Ms. Craig implied that those who assisted Plaintiff and Class counsel would suffer adverse consequences. *Id*. ¶ 25. At this meeting, Ms. Craig thanked Class member for opting out. *Id*. However, at this time, class notice had not yet been mailed and therefore it was not yet possible to opt out. Rekhi Decl. ¶ 2.

B. The Opt-Outs Are Suspiciously Uniform and Appear to Predate Class Members Receiving Class Notice.

In the afternoon of February 28, 2019, the class action administrator, CPT Group ("CPT"), mailed out the Court-approved class notice packet from southern California. Rekhi Decl., Ex. 1. The notice packet did not include opt-out forms. Rekhi Decl. ¶ 3. Nor was a return envelope provided. *Id*. On March 8, 2019, CPT sent a status report to the parties confirming that no responses had yet been received. *Id*., Ex. 3. On March 15, 2019, CPT sent the next status report with this one indicating that 63 responses had been received, all of which were "opt-outs." Rekhi Decl., Ex. 4. On March 18, 2019, the parties agreed to review the "opt-out" received by CPT, which were then sent to the parties the next day. *Id*. ¶ 1.

Even though CPT did not provide an opt-out form, all of the 76 opt-outs are identical except for the signature and date. Rekhi Decl., Exs. 5. 63 of 73 opts-outs were received by CPT on the same day, March 11, 2019. *Id*. Two opt-outs are dated February 28, 2019, the day class notice was placed in the mail in southern California. *Id*., Ex. 5. Forty-seven opt-out forms are dated March 1, 2019, one day after CPT mailed the notice. See *Id*. Mr. Riddle, who signed one such opt-out form, testified that a stack of blank opt-outs forms just appeared on his desk at

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

Defendant's facility. Rekhi Decl. ¶ 10. Mr. Nelms and Mr. Bell testified that the opt-out forms were made available at Defendant's facility along with pre-addressed envelopes. Cairns Decl. ¶ 4.

Class counsel has also reviewed the envelopes retained by CPT that contained the opt-outs. Rekhi Decl., Ex. 5. Each envelope is nearly identical with the delivery address printed (with the same font) while the return addresses are all handwritten. *Id*. The envelopes show almost all opt outs were mailed from the same postal designation. *Id*.

C. **Defendant has Coerced, Solicited, and Encouraged Class Members to Opt-Out.**

To date, several Class members who are former employees have reached out to Class counsel complaining that BPLC officers and/or mangers solicited them into signing opt-out forms. For example, Class member Doug Mast confirmed that while he was still employed by Defendant, Defendant initiated several discussions with him about the lawsuit and pressured him to opt out, even directing him to sign an opt out form in the presence of his supervisor. Declaration of Doug Mast ¶¶ 11-15. Mr. Mast refused to sign with Defendant failing to offer him work after that. *Id.* at ¶¶ 15-17. Defendant terminated his employment on March 6, 2019. *Id.* at ¶ 18.

Class member Jedidiah Wilson similarly confirms Defendant repeatedly pressured him to opt-out and support Defendant's position in the lawsuit. *See generally* Wilson Decl. On October 22, 2018, Plaintiff submitted a declaration signed by Mr. Wilson in support of Plaintiff's motion for class certification describing Defendant's wage and hour violations at issue during his prior employment at Defendant. Dkt. No. 57. Defendant rehired Mr. Wilson around that time and, after a few days, Ms. Craig and Mr. Hamilton pressured Mr. Wilson to

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

opt-out even before the class was certified. Wilson Decl. ⁋ 12. Based on these discussions, he felt compelled to call Class counsel and seek to withdraw his signed declaration in support of class certification. Wilson Decl. ⁋12. He made the call in the presence of Mr. Hamilton and Ms. Craig. Wilson Decl. ⁋12. Around this time, Defendant provided Mr. Wilson with $1,000.00 designated as a loan although Defendant did not discuss any repayment terms or interest with Mr. Wilson. Wilson Decl. ⁋13. Subsequently, on January 9, 2019, Ms. Craig texted Mr. Wilson that, "There will be a form to opt out. I will get it to you when it becomes available or there are further instructions of what or how to opt out." Wilson Decl., Ex. A. Later, when Defendant suspected that Mr. Wilson had been speaking with Class counsel, he was terminated. Wilson Decl. ⁋⁋28-33.

Another Class member, Donald Wren, is also a former employee who Defendant has been pressuring to opt out. *See* Wren Decl. ⁋12. He testified he received multiple calls from a number associated with BPLC. *Id*. When he answered, he spoke to a woman he believes to be Ms. Craig. *Id*. She pressured Mr. Wren to opt-out. *Id*. He refused but has continued to received calls from that same number. *Id*.

At Mr. Hamilton's deposition, he identified 47 Class members who were current employees as of January 2019; all Class members were or are at-will employees. Rekhi Decl., ¶ 12. Of those 47 Class members only five have not opted-out. Two of those five Class members are Doug Mast and Mr. Wilson, who are now former employees confirming they believe they were terminated for refusing to opt-out. Another Class member who did not opt out is no longer employed by Defendant as of March 2019. Rekhi Decl. ¶ 13.

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
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Overall, and throughout this litigation, Defendant and its agents have pressured Class members to relinquish their legal rights at issue by signing false or suspect declarations and opt out forms. *See, e.g.*, Wilson Decl. ¶¶ 25-32; Mast Decl. ¶¶ 11-19; Shearon Decl. ¶¶ 7-8; Chatterton Decl. ¶¶ 9-10; Dkt. No. 138 at 4-6. The conduct described above and Defendant's ability to have unmonitored communications with Class members have given Defendant a bully pulpit from which to secure its at-will Class members' compliance with its litigation objectives.[1] By and through these contacts, Defendant has misrepresented this lawsuit and thereby obtained the declarations and opt-outs. The above evidence indicates that Defendant, rather than the Class members, is the driving force behind the deluge of recent opt-outs. Likewise, the declarations opposing class certification reflect a pattern form with Defendant selectively representing that this lawsuit is only about meal and rest breaks and thereby falsely concluding that Defendant does not owe the declarants any wages.

III. STATEMENT OF ISSUES

Should the Court prohibit Defendant from communicating with Class members about the lawsuit and order curative measures given Defendant's abuse to date and the substantial likelihood that Defendant will otherwise continue to inappropriately pressure employees to abandon their rights for its benefit?

[1] In addition to having leverage over Class members who are current employees, Defendant enjoys ongoing business relationships with certain Class members who are former employees. *See* Cairns Decl., Ex. 1.

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
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IV. EVIDENCE RELIED UPON

Plaintiff relies on the declarations of Hardeep S. Rekhi, Daniel Cairns, Donald Wren, Doug Mast, and Jedidiah Wilson, the exhibits attached thereto, and the balance of pleadings and papers on file in this action.

V. AUTHORITY

A. Defendant's Abusive Conduct Requires Curative Intervention by the Court.

The Annotated Manual of Complex Litigation provides guidance when an adverse party seeks to pressure Class members to sacrifice their legal rights to the advantage of the adverse party:

> If improper communications occur, curative action might be necessary, such as . . . voiding improperly solicited opt outs and providing a new opportunity to opt out. Other sanctions may be justified, such as . . . contempt and fines, [and] assessment of fees . . . .

MCL § 21.33 (4th ed.). As set forth above, Defendant has engaged in improper communications with Class members and curative actions are necessary.

In addition, when the Class was certified pursuant to CR 23(b)(3), due process requires that Class members receive "the best notice practicable under the circumstances." CR 23(c)(2); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974).[2] A neutral and objective notice is necessary because "[i]t is essential that the Class members' decision to participate or to withdraw be made on the basis of independent analysis

[2] Because CR 23 is based on its federal counterpart, interpretations of analogous provisions by federal courts are persuasive to the extent they do not contradict the decisions of Washington's courts. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001)

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
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of [their] own self-interest." *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720, 723 (W.D. Ky. 1981).

Accordingly, a trial 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." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981). Specifically, CR 23(d) authorizes a court to issue orders "for the protection of the members of the Class or otherwise for the fair conduct of the action . . . ." CR 23(d)(2). This power furthers the dual policy of protecting absent class members while fostering the fair and efficient resolution of numerous claims involving common issues. *In re Sch. Asbestos Litig.*, 842 F.2d 671, 680 (3d Cir. 1988).

Because a defendant's "[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," a trial court has "ample discretion" to prohibit the defendant from communicating with Class members. *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1203 (11th Cir. 1985); *see also Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630, 632 (N.D. Tex. 1994) (defendant who attempts to influence individuals not to join class action damages purposes of Rule 23). "Actual harm need not be proven to justify an order limiting Class contacts. Rather, an order limiting contacts is justified upon a finding of 'a likelihood of serious abuses.'" *Hampton Hardware, Inc.*, 156 F.R.D. at 633 (citation omitted). "Direct contact between parties in class action litigation is to be avoided, presumably in part to avoid trickery and coercion; instead, any necessary contacts related to the subject matter of the litigation are to be funneled through the parties' respective counsel." MCL § 21.15 (4th ed.).

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
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The Washington Supreme Court has warned about this specific form of class action abuse: "The potential abuses of the class action process include . . . exertion of undue influence on class members to opt out, and misrepresentations creating false impressions of the action and the court's rule." *Darling*, 96 Wash. 2d at 706. "Defendants and their counsel . . . may not give false, misleading, or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3)." MCL § 21.12 (4th ed.). *Ralph Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 99 CIV. 4567 (AGS), 2001 WL 1035132, at *4 (S.D.N.Y. Sept. 7, 2001) ("clear potential for abuse" where "the potential class members depend upon the defendant for information.")

The evidence submitted here shows that BPLC has been actively engaging in such abusive conduct. In particular, the company has coerced Class members to provide false statements and intimidated them so they would not cooperate with Class counsel's investigation. Defendant employs or has an ongoing business relationship with 47 of the 50 declarants. Cairns Decl., Ex. 1. As described above, a review of the declarations and the recent testimony of declarants indicate they received misinformation about the scope of the claims at issue. Indeed, most declarants testified the lawsuit was about meal and rest breaks with no mention of the other claims related to prevailing wage rate, overtime pay, and travel time pay. *Id.* Defendant knowingly failed to provide Class members with accurate information.

It will be difficult to undo the harm done by Defendant's conduct, but the Court is empowered to impose the requested curative measures. First, the Court should void the opt-outs to date and ask those Class members to re-affirm their intent to opt out. *See Georgine v. Amchem Prod., Inc.*, 160 F.R.D. 478, 517–18 (E.D. Pa. 1995) (providing such relief after

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

finding that misleading communications likely misled class members into opting out). The Court should order that a new notice be sent to the Class at Defendant's expense, with information about Defendant's wrongful conduct. *See, e.g., Ralph Oldsmobile*, 2001 WL 1035132, at *7 (ordering corrective notice be sent at the expense of the party at fault); *Hammond*, 167 F. Supp. 2d at 1293–94 (ordering party at fault to pay attorneys' fees and costs incurred by opposing party to file protective orders); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1247 (N.D. Cal. 2000) (ordering printing and mailing costs of curative notice to be paid by party at fault). Likewise, the Court could order that a neutral statement about the lawsuit be read to Class members at a mandatory meeting. As the Manual of Complex Litigation says, "Curative notices generally should be disseminated in the same form as was the misinformation to be corrected." 21.313. Other Court Notices, Ann. Manual Complex Lit. § 21.313 (4th ed.)

B. **Defendant Must Be Prohibited from Communicating with Class Members about This Case.**

Courts are keenly aware of the unequal balance of power that exists in an employer–employee relationship. This imbalance takes on particular significance in employment litigation, given the undue influence an employer may exert on its employees. "Where the defendant is the current employer of . . . 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." *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000). "[S]imple reality suggests that the danger of coercion is real and justifies the imposition of limitations on [a defendant-employer's] communications with . . . Class members." *Abdallah v.*

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

Coca-Cola Co., 186 F.R.D. 672, 678 (N.D. Ga. 1999); *see also Morden v. T-Mobile*, 2006 WL 2620320 (W.D. Wash. Sept. 12, 2006) (declining to consider 99 declarations of current employees due to concerns about coercion); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 664 (D. Minn. 1991) (current employees "have an interest in maintaining amicable relationships at work"); *Rainbow Group, Ltd. v. Johnson*, 990 S.W.2d 351, 357 n.5 (Tex. Ct. App. 1999) (current employees who signed declarations in support of employer likely "feared professional consequences of not signing"). As the U.S. Supreme Court recognized long ago, employees "are often induced by fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce detrimental to their health or strength." *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 394 (1937).

As set forth above, BPLC has already taken advantage of its employer status by requiring employees to sign false declarations and intimidating them so that they will not cooperate with Class counsel. Further, Defendant has mispresented the scope of the lawsuit by claiming it was only related to rest and meal breaks, pressured Class members to opt-out while they were at work, and, on at least two occasions, terminated current employees days after they refused to opt-out. Because employees have an obvious incentive to remain on good terms with the company, they will continue to act against their own legal rights at issue rather than risk losing their jobs. *See id*.

C. **First Amendment Concerns Do Not Preclude Plaintiff's Requested Relief.**

Plaintiff is aware that regulating Defendant's communications with Class members may implicate First Amendment concerns. *See Kleiner*, 751 F.2d at 1204. However, "[i]n the realm of litigation, a fair and just result often presupposes restraints on the speech of parties." *Id*. at

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

1206 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). Moreover, it has never been an abridgement of free speech to prohibit a course of conduct merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. *Id*. at 1203.

For several reasons, limiting BPLC's communications with Class members regarding the litigation accords with constitutional protections. First, "[i]t is well settled that courts may reasonably protect the integrity of their proceedings by limiting activities ordinarily protected by the First Amendment." *Waldo v. Lakeshore Estates, Inc.*, 433 F. Supp. 782, 790 (E.D. La. 1977). Second, "the Supreme Court has repeatedly warned that traditional prior restraint safeguards do not necessarily extend to questions of commercial speech." *Kleiner*, 751 F.2d at 1204. Speech that "encourag[es] potential Class members not to join in the suit[] is grounded in the 'economic interests of the speaker and the audience'" and thus is commercial in nature. *Hampton Hardware*, 156 F.R.D. at 633 (quoting *Kleiner*, 751 F.2d at 1203 n.22). Third, "untruthful or misleading speech has no claim on first amendment immunity." *Kleiner*, 751 F.2d at 1204.

"[A]n order limiting communications regarding ongoing litigation between a Class and Class opponents will satisfy first amendment concerns if it is grounded in good cause and issued with a 'heightened sensitivity' for [those] concerns." *Kleiner*, 751 F.2d at 1205. "A finding of good cause has been found to rest upon four criteria including: 'the severity and likelihood of the perceived harm; the precision with which the order is drawn; the availability of a less onerous alternative; and the duration of the order.'" *Hampton Hardware*, 156 F.R.D. at 633 (quoting *Kleiner*, 751 F.2d at 1206). Here, that harm is unmistakable. BPLC has already

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

used its position to compel 90 Class members to sign false statements against their own interests. Defendant has also intimidated Class members to keep them from cooperating with Class counsel and learning about the scope of the lawsuit. Further communications by BPLC will undoubtedly prevent more Class members from freely exercising their rights in the action.

Furthermore, the relief Plaintiff seeks is narrowly circumscribed to prevent BPLC from engaging in similar misconduct in the future. A prohibition against communications regarding the litigation will not interfere with the ability of BPLC to conduct normal, everyday business. *See Hampton Hardware,* 156 F.R.D. at 634.

Finally, BPLC (but not its counsel) should be prohibited from learning whether specific Class members choose to exclude themselves from the lawsuit. This will prevent Defendant from retaliating against employees who choose to remain Class members.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant his motion and provide the relief as requested above.

DATED this 21st day of March, 2019.

REKHI & WOLK, P.S.

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

By: /s/ *Daniel Cairns*
Hardeep S. Rekhi, WSBA No. 34579
Gregory A. Wolk, WSBA No. 28946
Jaime Heimerl, WSBA No. 49100
Daniel Cairns, WSBA No. 49950
529 Warren Ave N., Suite 201
Seattle, WA 98109
Telephone: (206) 388-5887
Fax: (206) 577-3924
E-Mail:hardeep@rekhiwolk.com
greg@rekhiwolk.com
jaime@rekhiwolk.com
daniel@rekhiwolk.com

I certify this memorandum contains less than 4,200 words, which complies with Local Civil Rules.

Attorneys for Plaintiffs

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924