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Court of Appeal, Fourth District, Division 1, California.

Davis PARKER et al.,
Plaintiffs and Respondents,
v.
WILLMARK COMMUNITIES, INC.
et al., Defendants and Appellants.

D069466
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Filed 10/20/2017

Appeal from an order of the Superior Court of San Diego County, Joel M. Pressman, Judge. Dismissed. (Super. Ct. No. 37–2015–00017514–CU–FR–CTL)

Attorneys and Law Firms

Michelman & Robinson, Mona Z. Hanna, Todd H. Stitt and Robin James; Morris Polich & Perdy and Lane E. Webb; Wood Smith Henning & Berman, for Defendants and Appellants.

Law Office of Jimmie Davis Parker and Jimmie Davis Parker; Law Office of Leonard B. Simon and Leonard B. Simon; Phillips, Erlewine, Given & Carlin, R. Scott Erlewine, David M. Given and Brian S. Conlon, for Plaintiffs and Respondents.

AARON, J.

I.

INTRODUCTION

***1** Willmark Communities Inc. and their codefendants (collectively Defendants), appeal from a trial court order regarding precertification communications in a putative class action filed by Davis Parker, Jill Miller, and Paul Miller (collectively Plaintiffs). Plaintiffs are former tenants of apartment complexes owned or managed by Defendants, and their complaint alleges improper security deposit practices.

After the lawsuit was filed, Defendants attempted to settle with certain members of the putative class, initially without advising them about the class action, and later using a release form that disclosed the lawsuit, but that Plaintiffs viewed as misleading. Plaintiffs sought relief, and the trial court ultimately entered the order at issue. The order required Defendants to obtain court approval before initiating further settlement communications with putative class members, limited settlement-related communications by Plaintiffs' attorneys, and required Defendants to send a curative notice to putative class members to whom they had previously made settlement offers.

Defendants argue that the trial court improperly enjoined their settlement communications with putative class members, and that if this court determines that the order is not an appealable injunction, we should construe the appeal as a petition for writ of mandate. Plaintiffs contend that the order is a proper interlocutory ruling, that it is not appealable, and that Defendants' appeal should not be treated as a writ petition.

We conclude that the order is not appealable, and that the circumstances do not warrant construing this improper appeal as a writ petition. The appeal is therefore dismissed.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Proceedings Leading to the Order Governing Communications*

Plaintiffs filed this action in May 2015, on behalf of themselves and a putative class of former tenants, alleging that Defendants had engaged in unlawful practices, including improperly withholding security deposits and imposing additional or unsubstantiated charges in connection with those deposits.[1]

1 All dates are in 2015 except as otherwise noted. At the time, the codefendants were Alpine Creekside, Inc., Alpine Woods Apartments, Inc., La Jolla Nobel I,

Inc., MS North Park Properties, Inc., Rancho Hillside, Inc., Prominence Willmark Communities, Inc., Pavlov, Inc., Shadowridge Park, Inc., Willmark Communities University Village, Inc., Willmark Communities UTC Finance 1, Inc., and Mark Steven Schmidt. Schmidt is not a party to this appeal.

In September, Plaintiffs learned from a former tenant that an employee of Defendants had called him, advised him that the company had performed an audit and owed him money, and told him that "all [he had] to do was [to] sign paperwork and the money was [his]."[2] The employee provided the former tenant with a release. The employee did not mention the pending lawsuit and the release made no reference to it.

2 The former tenant provided a declaration regarding these events. Plaintiffs' counsel deposed the employee, who acknowledged that he had called the tenant, "talked to him about [how] [he] wanted to send him some money and a release," and "sen[t] him a release ...."

***2** Plaintiffs filed an ex parte application "to enjoin Defendants' improper communications and settlement offers to putative class members." They sought an order prohibiting Defendants from communicating with class members until an upcoming October status conference and requiring Defendants to identify former tenants to whom offers had been made. They also briefly addressed why, in their view, the requirements for temporary injunctive relief were satisfied. The court denied the application without prejudice. The hearing was not reported, but Plaintiffs represent that the trial court instructed Defendants to inform putative class members about the lawsuit in future communications.

Defendants prepared a revised release form, to which they added a section titled "NOTICE OF CLASS ACTION." The new section described the lawsuit and directed recipients to the court's website or to media coverage for additional information.

The parties filed reports for the status conference. Plaintiffs contended that the revised release had "its own vice," because "it prominently includes the words 'Notice of Class Action,' " thus "resembl[ing] an official court communication," and that it would "appear to many class members to have the imprimatur of the Court and/or Plaintiffs' counsel." They identified other alleged improper conduct by Defendants, as well, including having a lawyer solicit releases from certain putative class members, placing multiple calls a day to individuals, and advising putative class members that they had limited time to decide whether to accept the settlement offers. Defendants reported that they had contacted the tenants with whom they had previously spoken and informed them about the lawsuit (and subsequently stated in court that they advised those tenants that they could void the settlements and return the money.) Defendants also noted their revisions to the release form.

At the October status conference, the court stated that it was "inclined to stop the communications, particularly the conversations ... in terms of settlement offers, until we have a mediation." The court instructed counsel to, among other things, "draft an order regarding oral communications with the class and submit it for signature." Plaintiffs prepared a draft order that contained a curative notice to individuals who had received settlement offers (Notice A) and a proposed notice that Defendants could use in making any further settlement offers (Notice B).

At a subsequent status conference, the trial court noted that it had issued a tentative ruling in Plaintiffs' favor.[3] Plaintiffs' counsel stated that Defendants had "made it very clear they're going to appeal your order," and that "an appeal is the last thing we want. ..." The court commented that "the law in California [i.e. regarding precertification settlement communications] ... is unclear" and that it "wouldn't mind some direction." Plaintiffs' counsel also addressed Notice B, noting the court's tentative ruling that it did not want Defendants making further settlement offers and stating: "I think [Y]our Honor ought to carefully consider ... crafting Notice B ...." The court indicated that "if you all agree to a modified [Notice] B ..., I'll be more than happy to consider it ...." Defense counsel stated: "I'm not sure what that will do to our appeal. It may moot our appeal." Plaintiffs' counsel reiterated that there was no reason for an appeal, and that they were "willing to work toward a fair, even-handed, equal-access way for [Defendants] to approach additional class members...."

3 The tentative ruling does not appear to be in the record.

Counsel appeared in November for a hearing and reported that they had been unable to reach agreement. Plaintiffs' counsel indicated that they had withdrawn their request that the order include a curative notice, but Defendants insisted that the notice be included in the order and said that they were going to appeal it. Defense counsel disputed this characterization, explaining that their position was based on the court's tentative ruling, and that they were of the view that "we should address both of these issues [communication

with potential class members and the curative notice] at the same time," to avoid going back and forth to the Court of Appeal. Defendants offered to remove the notice, if Plaintiffs and the court did not want it included. The attorneys and court continued to discuss the order, in light of Defendants' plan to appeal. The court stated: "I think that it's important ... that there be some determination in this area of the law and we get some guidance from the Court of Appeals [*sic*]."[4]

4 Also in November, the trial court ordered a *Belaire–West* notice, which informed the putative class members about the class action, the allegations at issue, and their right to object to disclosure of personal information. Plaintiffs suggest that issuance of this order "highlights the ever-increasing mootness" of Defendants' appeal. Because we dismiss on appealability grounds, we need not address mootness.

B. *The Order Governing Communications*

***3** The trial court entered the Amended Order Governing Communications by Counsel to Putative Class Members Regarding Settlements or Release on December 1, 2015 (the December 1 Order).[5]

5 The initial version of the order did not contain a copy of the curative notice. The record does not disclose the reason for this omission.

The trial court found that Defendants had initially contacted putative class members to offer them cash or debt forgiveness in exchange for a release, without advising them that there was a class action pending. The court further found that the revised release "disclosed the pendency of the putative class action, but is misleading in a different way by appearing to be an official document with the imprimatur of the court, like a formal notice of class action." The court also noted that Defendants "continued having counsel telephonically make and negotiate settlement agreements with former tenants."

The trial court explained that "it is important that class members be fully and fairly informed of the pendency of the class action, and its potential benefits for them," and noted that the court had "an obligation to protect potential class members from irreparable injury until certification is decided...." The court determined that "offers to settle without sufficient notice of the pending litigation or other important facts can be misleading," and that both of Defendants' written solicitations were "misleading and improper." The court also expressed concern about the telephonic communications with putative class members, including by Defendants' counsel. The court concluded: "The Court will not block all communication by Defendants seeking to settle individual claims, but will control it to attempt to avoid abuse and/or misleading communications. The Court will also restrict Plaintiffs' counsel in this regard ... to provide useful information to class members and establish a[s] level playing field as possible." The court proceeded to order the following:

"1. Defendants shall not make any further written or oral communications with putative class members regarding settlement of this case or release of any claim presented in this case without prior Court approval; however, Defendants may respond to inquiries from putative class members who have already received a settlement communication prior to this Order.

"2. Plaintiffs' counsel likewise shall not communicate with putative class members regarding settlement offers unless the putative class member has already received a settlement communication from Defendants or if the putative class member initiated the communication.

"3. Defendants shall cause and pay for the mailing of the attached Exhibit A curative notice. It shall be sent within 30 days of this Order to all putative class members to whom Defendants have communicated a settlement offer and/or release regarding this case, regardless of the response or lack thereof. A list containing the name and address that each Exhibit A was sent to and the date it was sent, shall be provided to Plaintiffs' counsel. No further oral communication shall be had with these putative class members by any counsel regarding settlements of Exhibit A unless initiated by the class member.

***4** "4. Any putative class member wishing to void his or her settlement agreement entered before this Order shall follow the direction set forth in Exhibit A within 90 days of the mailing of Exhibit A. The settlement agreements entered in to [*sic*] before this order are not void, but voidable at the option of the putative class member.

"5. This order shall not prevent Defendants from communicating with current or former tenants for bona fide business purposes that do not violate this order.

"6. Counsel for Plaintiffs and Defendants are permitted to engage in communications with putative class members for any reason other than for settlement or release of any claims presented in this action."

Defendants appealed. In January 2016, the trial court issued an order staying "the enforcement of the mandatory injunction portion of the Order" pending the appeal.

This court requested letter briefs from the parties addressing the appealability of the December 1 Order. Defendants provided a brief in response to our request, but Plaintiffs indicated they did "not desire to challenge" appellate jurisdiction at this stage and reserved their right to do so in their merits brief. We allowed the appeal to proceed, indicating that the parties could address appealability in their briefing on the merits and that the court may consider the issue. Plaintiffs later filed a motion to dismiss for lack of jurisdiction, and Defendants opposed. The motion was deferred to this merits panel. The parties also addressed appealability in their merits briefs.

III.

DISCUSSION

There are two threshold issues here: whether the December 1 Order is appealable, and if not, whether we will construe the appeal as a writ petition.

A. *Appealability*

1. *Governing law*

"The existence of an appealable judgment is a jurisdictional prerequisite to an appeal." (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1292 (*Doran*).)

"California is governed by the 'one final judgment' rule which provides 'interlocutory or interim orders are not appealable, but are only "reviewable on appeal" from the final judgment.' [Citation.] The rule was designed to prevent piecemeal dispositions and costly multiple appeals which burden the court and impede the judicial process. [Citation.] In keeping with this rule, [Code of Civil Procedure [6]] section 904.1 generally authorizes appeals from superior court judgments, except those which are interlocutory." (*Doran,* 76 Cal.App.4th at pp. 1292–1293.) Interlocutory rulings " 'within the statutory classes of appealable interlocutory judgments' " remain appealable. (*Id.* at p. 1293.) It is the appellant's burden to explain why an order is appealable. (Cal. Rules of Court, rule 8.204, subd. (a)(2)(B); *In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1496, fn. 5.)

6 Further statutory references are to the Code of Civil Procedure, unless noted.

2. *Application*

Defendants contend that the December 1 Order is an appealable injunction.

a. *Principles governing appealable injunctions*

Section 904.1, subdivision (a)(6) allows an appeal to be taken from "an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction." An injunction is " 'a writ or order requiring a person to refrain from a particular act.' (Code Civ. Proc., § 525.) Injunctions also may command a person to perform a particular act." (*PV Little Italy, LLC v. MetroWork Condo Association* (2012) 210 Cal.App.4th 132, 143 (*PV Little Italy*).) "Whether a particular order constitutes an appealable injunction depends not on its title or the form of the order, but on ' "the substance and effect of the adjudication." ' " (*Id.* at pp. 142–143.)

***5** Orders controlling litigation conduct are not injunctions simply because they require action or inaction from parties or counsel. It is "well established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them." (*Rutherford v. Owens–Illinois, Inc.* (1997) 16 Cal.4th 953, 967; see § 128, subd. (a)(5) [powers include controlling the "conduct of ... persons ... connected with a judicial proceeding before it ...."].) "In the context of a class action, it is the court's authority and duty to exercise control over the class action to protect the rights of all parties, and to prevent abuses which might undermine the proper administration of justice." (*Howard Gunty Profit Sharing Plan v. Super. Ct.* (2001) 88 Cal.App.4th 572, 581 (*Howard Gunty*).)

San Francisco Unified School Dist. ex rel Contreras v. First Student, Inc. (2013) 213 Cal.App.4th 1212 (*San Francisco Unified*) is instructive. There, former employees of a bus contractor and a nonprofit group filed a qui tam action against the contractor and its successor (First Student, Inc. or FSI), based on an alleged failure to maintain and repair buses. (*Id.* at pp. 1215–1216.) After FSI's initial efforts to address contacts

with its current employees by plaintiffs and their counsel (resulting in a court instruction that parties not discuss the lawsuit with employees), an individual plaintiff contacted an FSI employee shortly before his deposition and FSI moved for a preliminary injunction. (*Id.* at pp. 1222, 1225.) The trial court issued an order barring the individual plaintiffs from discussing the lawsuit with current FSI employees. (*Id.* at pp. 1225–1226.)[7] In addressing the applicable review standard, the Court of Appeal noted that the parties characterized the request as an application for a preliminary injunction; however, the court "construe[d] the order as an exercise of the court's inherent power to control the proceedings before it." (*Id.* at p. 1226.) The Court of Appeal explained:

> "A court issues [an] injunction when it determines that the plaintiff is likely to prevail on the merits and the interim harm to the plaintiff if the injunction is denied outweighs the interim harm to the defendant if the injunction is issued. [Citation.] Here, the ... requested injunctions were designed not to preserve the status quo with respect to the parties' underlying dispute ... but rather to prohibit allegedly improper behavior with respect to the litigation process itself." (*Ibid.*)

Consistent with these principles, this court reached the converse result in *PV Little Italy*, a case involving voting rights in a real estate development. (*PV Little Italy, supra*, 210 Cal.App.4th at p. 134.) There, we determined that a trial court order invalidating a board election was an appealable injunction, where it "required the immediate turnover of control ... and the holding of a new election." (*Id.* at p. 143; see *ibid.* [order "resolved the core conflict between the parties"].)[8]

7 The order addressed other matters as well, but the portion challenged on appeal stated: "Plaintiffs Manuel Contreras and William Padilla are to refrain from discussing this case, or any subjects related to this case, with current [FSI] employees during the pendency of this lawsuit. Neither Mr. Contreras nor Mr. Padilla may contact [FSI] employees and solicit [FSI] employees to contact Plaintiffs' counsel. If a [FSI] employee voluntarily initiates contact with Mr. Contreras or Mr. Padilla and begins to discuss this case, or any subjects related to this case, then Mr. Contreras or Mr. Padilla are to tell the employee that they cannot discuss this case but that the employee can contact Plaintiffs' counsel, and then Mr. Contreras and Mr. Padilla shall have no further discussions regarding the case with the employee." (*San Francisco Unified, supra*, 213 Cal.App.4th at p. 1225.)

8 Federal courts likewise decline to treat litigation management orders as injunctions. (See *Gulfstream Aerospace Corp. v. Mayacamas Corp.* (1988) 485 U.S. 271, 279 [an order "that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable"]; see also, *e.g.*, *Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 406 (2d Cir. 1963) [appealable injunctions "giv[e] some or all of the substantive relief sought by a complaint," and do not include "orders concerning the conduct of the parties or their counsel, unrelated to the substantive issues in the action"].)

b. *The December 1 Order is not appealable*

***6** As a preliminary matter, we must clarify what the December 1 Order requires. Defendants repeatedly refer to the order, both directly and indirectly, as a "bar" on precertification settlement communications.[9] We recognize that Defendants seek certainty regarding the propriety of precertification settlements generally, but their characterization of the order is not accurate. The order bars Defendants from "further ... communications with putative class members regarding settlement ... *without prior Court approval*," (emphasis added) leaving them free to seek court approval for proposed settlement communications. Defendants do not contend, and we see nothing to suggest, that the trial court would arbitrarily withhold such approval. The order also does not void existing settlements (although it does render them voidable). Nothing in these directives or the remainder of the order reflects any prohibition on precertification settlement communications or settlements.

9 These references include, but are not limited to: "a complete prohibition"; "barring all of Defendants' settlement-related communications"; "prohibited Defendants from settling ... and/or communicating about settlement"; "total ban on communications"; "total bar on all future settlement discussions"; and "access was barred...."

Focusing on the substance and effect of the December 1 Order, it does not impact the "status quo with respect to the parties' underlying dispute...." (*San Francisco Unified, supra*, 213 Cal.App.4th at p. 1226; compare with *PV Little Italy, supra*, 210 Cal.App.4th at p. 143 [order affected parties' conflict].) The order states that it "shall not prevent Defendants from communicating with current or former tenants for bona fide business purposes," thus imposing no limitation on the security deposit practices at issue. Rather,

the order limits "allegedly improper behavior with respect to the litigation process itself." (*San Francisco Unified*, at p. 1227.) Specifically, the trial court found that Defendants had engaged in misleading settlement communications, determined that the court had an obligation to protect putative class members (i.e., from such communications), and imposed the directives at issue in response. We conclude that the December 1 Order is an exercise of the court's power to control the class action proceedings, not an injunction.

Defendants' arguments to the contrary are not persuasive.

First, Defendants suggest that Plaintiffs and the trial court intended the December 1 Order to be an injunction, citing Plaintiffs' papers and arguments in the trial court, discussion at the hearings, and the court's use of the term "mandatory injunction" in its post-appeal order regarding the curative notice. Even assuming that such intent could be inferred, it is irrelevant. The characterization of an order does not dictate its legal effect. (*In re Marriage of Loya* (1987) 189 Cal.App.3d 1636, 1638 [explaining that "appellate courts have no jurisdiction to entertain appeals except as provided by the Legislature," and that party consent cannot " 'make a nonappealable order appealable' "]; *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1107 [parties and court cannot designate interlocutory judgment as appealable].)[10]

10 Defendants also contend that plaintiffs waived the right to file their motion to dismiss by declining to address jurisdiction when this court requested letter briefs. Lack of appellate jurisdiction can be raised at any time. (*Ponce–Bran v. Trustees of Cal. State Univ.* (1996) 48 Cal.App.4th 1656, 1661, fn. 2). Nevertheless, we encourage parties to address appealability at the earliest opportunity, particularly where, as here, the court has requested their input.

Next, Defendants attempt to distinguish *San Francisco Unified*. First, they argue that the case did not involve a class action and that the holding was based in part on the order being sought by the defendant. The significance of *San Francisco Unified* is its injunction analysis; the absence of class allegations is immaterial. As for party status, the Court of Appeal was contrasting a preliminary injunction sought by a plaintiff to preserve the status quo, with the relief sought by defendant there regarding the litigation process. (*San Francisco Unified, supra*, 213 Cal.App.4th at p. 1227.) Here, the relief sought by Plaintiffs *did* relate to the conduct of the litigation. Second, Defendants contend that although the witness contact in *San Francisco Unified* was "clearly the type" that is within the court's power to regulate, the "communication enjoined in this case is the Defendants' attempts to settle their differences individually ...." The communication limitations in the order do not bar settlement communications and do fall within the court's power to regulate the action. Finally, Defendants note that the court in *San Francisco Unified* reached the merits, implying that the court would not have retained jurisdiction if the order were not appealable. But the Court of Appeal was silent as to why it did so, and we decline to speculate. (*Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 164, fn. 34 (*Borikas*) [a "case is not authority for a proposition it does not address"].)[11]

11 *See Polyplastics, Inc. v. Transconex, Inc.* (1st Cir. 1983) 713 F.2d 875, 879 [dismissing appeal for lack of jurisdiction; distinguishing Supreme Court case where appeal was entertained, but "interlocutory appealability ... was not mentioned," explaining: "[W]e do not believe that the case can be taken to have decided so important a jurisdictional question sub silentio."].)

***7** Defendants further contend that *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, a wage and hour action, "contemplates the issuance of injunctions" regarding precertification communication disputes. In *Parris*, the plaintiffs sought an order permitting contact with putative class members. (*Id.* at pp. 290–291.) The trial court denied the request and the plaintiffs sought a writ of mandate. (*Id.* at p. 291.) The Court of Appeal reversed, holding that the request was unnecessary, that courts "may rule on the propriety of precertification communications only if the opposing party seeks an injunction, protective order or other relief," and that immediate and irreparable harm would be required for such restrictions to be imposed. (*Id.* at pp. 299–300.) The Court's reference to a "protective order or other relief" suggests that such relief might not require an order with the substance and effect of an injunction. Regardless, the court did not address that issue, nor did it address whether the contemplated relief would be appealable. *Parris* thus cannot serve as authority on these matters. (*Borikas, supra*, 214 Cal.App.4th at p. 164, fn. 34.)

We conclude that the December 1 Order is not an appealable injunction. In addition, we observe that courts routinely issue orders that require or prohibit conduct, but that are not appealable. (See, *e.g., So. Pac. Co. v. Oppenheimer* (1960) 54 Cal.2d 784, 786 [it is "firmly established that orders relating to inspection and discovery are not appealable"]; *Bartschi v. Chico Comm. Mem. Hosp.* (1982) 137 Cal.App.3d

502, 507 [protective order requiring court approval not appealable].) In the class action context, although orders denying class certification may be appealed under the "death knell" doctrine, courts have held that other interim rulings generally are not appealable final or collateral orders. (See *Farwell v. Sunset Mesa Prop. Owners Assn., Inc.* (2008) 163 Cal.App.4th 1545, 1547–1548 ["other orders dealing with class actions have not been included" in death knell doctrine]; *Estrada v. RPS, Inc.* (2005) 125 Cal.App.4th 976, 978, 985–986 [no appeal after court ordered that questionnaire be sent to potential class members and dismissed some who failed to respond; dismissal orders were "part and parcel of the certification process"]; *Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1228–1229 [order directing notice of class action at plaintiffs' expense was nonappealable, interlocutory order].) These authorities illustrate that courts consistently reject efforts to appeal from routine litigation management orders, including in the class action context.[12]

12 See also, *e.g.*, *EEOC v. Mitsubishi Motor Manufacturing of America* (7th Cir. 1996) 102 F.3d 869, 871 (EEOC sent potentially misleading letter and the district court ordered a corrective communication and notice of future communications; the Seventh Circuit dismissed the appeal, explaining that the order was not final or collateral, but rather "a managerial order, like dozens of others a court must enter in the course of complex litigation"); *Lusardi v. Xerox Corp.* (3d Cir. 1984) 747 F.2d 174, 178–179 (order permitting plaintiff notice after conditional certification was not appealable; appealability would " 'invite the inundation of appellate dockets ... [and] constitute the courts of appeals as second-stage motion courts.' ")

B. *Writ relief*

Defendants contend that if we conclude that the December 1 Order is not appealable, we should construe their appeal as a petition for writ of mandate.

1. *Governing law*

"An appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate, but that power should be exercised only in unusual circumstances." (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366–1367.) The circumstances should also be " ' " 'compelling enough to indicate the propriety of a petition for writ ... in the first instance ....' " ' " (*Id.* at p. 1367; *Los Angeles Gay and Lesbian Center v. Super. Ct.* (2011) 194 Cal.App.4th 288, 299–300 (*LAGLC*) ["Conditions prerequisite to the issuance of a writ are a showing there is no adequate remedy at law ... and the petitioner will suffer an irreparable injury if the writ is not granted."].)[13]

13 Defendants note additional requirements for construing an appeal as a writ petition, including the existence of a substitute for a verified writ petition. (See *Olson v. Cory* (1983) 35 Cal.3d 390, 400–401 (*Olson*).) Because we conclude that writ review is not appropriate here, we need not address these other issues.

2. *Application*

***8** We begin with Defendants' efforts to establish unusual circumstances.

First, Defendants argue that this case presents an issue of first impression; namely, "whether, and under what circumstances, a defendant may settle claims with putative class members ...." prior to class certification. Although the existence of a novel issue may support writ review (*Fox Johns Lazar Pekin & Wexler, APC v. Super. Ct.* (2013) 219 Cal.App.4th 1210, 1217), the December 1 Order does not present the issue framed by Defendants. Again, contrary to Defendants' characterization, the order does not bar precertification settlement communications or settlements. Rather, it imposes limits on both parties' settlement-related communications, based on the court's finding that Defendants had engaged in misleading settlement efforts.

Moreover, the precertification communication issues actually presented by the order are not novel. In *Gulf Oil Co. v. Bernard* (1981) 452 U.S. 89, the United States Supreme Court held that the district court abused its discretion by limiting putative class communications without stating its grounds for doing so. (*Id.* at pp. 91–92, 94–96, 103 [following EEOC conciliation agreement, defendant made settlement offers and plaintiffs filed class action; district court limited communication with putative class with no factual findings or explanation].)[14] The Court explained that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." (*Id.* at p. 101.)

14 California courts "have looked to the procedures governing class actions under [federal law] and Rule 23 for guidance on novel certification issues." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437.) We reject Defendants' suggestion that it is only trial courts, not appellate courts, that may benefit from such guidance.

California and federal courts have since provided further guidance on these matters. (See *Howard Gunty, supra*, 88 Cal.App.4th at pp. 580–581 [addressing precertification limits on plaintiff communications and applying *Gulf Oil* requirements, including need for specific findings]; *Atari, Inc. v. Superior Court* (1985) 166 Cal.App.3d 867, 871, 873 [order permitted plaintiff access to putative class, and prohibited defendant access; Court of Appeal ordered the prohibition lifted, noting that there was "no factual showing, nor any specific finding, of ... any actual or potential abuse"]; *Parris, supra*, 109 Cal.App.4th at pp. 299–300; see, *e.g.*, *Rossini v. Ogilvy & Mather, Inc.* (2d. Cir. 1986) 798 F.2d 590, 601–602 [affirming order requiring prior approval for party communications with putative class; court's "specific findings of fact," including improper conduct, were sufficient to distinguish *Gulf Oil*].) These authorities contemplate that misleading statements or omissions by parties may justify appropriate limits on precertification communications.

Defendants' attempts to distinguish certain of these cases, apparently for the purpose of presenting a novel issue, are not persuasive. We recognize that the trial court expressed a desire for guidance, that the case law does not resolve all precertification communication issues, and that not all courts are in agreement as to what is and is not appropriate in this context. But this case does not present a novel issue requiring resolution.[15]

15 Defendants contend in the alternative that the appealability questions in this case raise another issue of first impression. Even if that were the case, we still would not reach the merits unless we concluded that the order was appealable or appropriate for writ treatment—which we do not, for the reasons discussed herein.

***9** Second, Defendants assert that dismissal would be "burdensome and circuitous ...." They urge that if we dismiss this appeal, both parties would be deprived of information relevant to class certification and the merits, and that Defendants would be prevented from defending themselves (in that their ability to reduce their exposure in this lawsuit would be hampered). They also argue that the parties had been working toward "mutually acceptable terms" when "the trial court simply banned Defendants' settlement communications ... for an indefinite period" (which they characterize as inefficient and unfair). These contentions lack merit. The December 1 Order does not impact the parties' investigations or case preparation, nor does it prevent Defendants from attempting to limit their exposure. (Cf. *Olson, supra*, 35 Cal.3d at pp. 400–401 [dismissal of nonappealable order would be dilatory and circuitous where, among other reasons, there were no other remaining issues].) As for the events preceding the order in the trial court, we do not see how this relates to the consequences *following* dismissal and, regardless, Defendants mischaracterize those events (and, again, the December 1 Order). Further, nothing in the record suggests that the trial court would have been unwilling to permit further negotiations. To the contrary, the court indicated that it was willing to review a proposed settlement communication if the parties were able to agree to one.

Third, Defendants contend that writ treatment is warranted "when the parties agree that the issue should be resolved in the Court of Appeal," citing *In re the Marriage of Ellis* (2002) 101 Cal.App.4th 400. They state that Plaintiffs "agree that this case presents an unresolved issue of first impression that warrants this Court's attention now." The record and briefing suggest otherwise, and regardless, *Ellis* involved agreement to writ review, not as to the novelty of the issues. (*Id.* at pp. 404–405 ["both parties request[ed] that we treat the appeal as a writ"].) Far from agreeing to writ review, Plaintiffs expressly request that we reject Defendants' request that we treat the appeal as a writ petition.

With respect to Defendants' argument that they will suffer irreparable harm if we do not review the December 1 Order, we are similarly unpersuaded. In substance, Defendants contend that precertification settlement may allow them to reduce their exposure, they cannot realize this benefit if the order remains in place, and an appeal from the judgment will not restore the settlement opportunity. Yet again, we are compelled to reiterate that the order does not bar precertification settlement. The order impacts only the manner in which Defendants make those settlement offers. Orders managing litigation always impose some limits, yet such orders generally remain inappropriate for writ review. (See, *e.g., O'Grady v. Super. Ct.* (2006) 139 Cal.App.4th 1423, 1439 ["review of discovery rulings by extraordinary writ is disfavored"].) For the same reasons, we reject Defendants' contention that they lack an adequate remedy at law.

In the absence of unusual circumstances or irreparable harm, we decline to construe Defendants' improper appeal as a writ petition. We therefore dismiss the appeal.

IV.

DISPOSITION

The appeal is dismissed. Plaintiffs shall recover their costs on appeal.

WE CONCUR:

BENKE, Acting P.J.

IRION, J.

All Citations

Not Reported in Cal.Rptr., 2017 WL 4707398

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