SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 03/02/2020 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2015-00186855-CU-OE-GDS** CASE INIT.DATE: 11/17/2015
CASE TITLE: **Richard Smigelski in his representative capacity vs. Pennymac Financial Services Inc**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion to Compel - Other - Civil Law and Motion

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Motion to Compel Discovery) taken under submission on 02/21/2020

TENTATIVE RULING

APPEARANCE REQUIRED.

At the time of hearing, counsel shall inform the Court of their progress on the production of electronically stored information (ESI); Requests for Production (RFPs) 9, 11, 13, 15, 17, 19, 21, 26 and 30-33; as well as any further progress they have made since they filed their Joint Statement.

Subject to arguments to be made at the time of hearing, the Court rules as follows on Plaintiff Richard Smigelski's (Smigelski) motion to compel further responses to form interrogatories, special interrogatories and document requests:

Overview

This is a putative wage and hour class action. Smigelski is the sole named plaintiff. The named defendants are PennyMac Financial Services, Inc., PennyMac Mortgage Investment Trust, and Private National Mortgage Acceptance Company, LLC (PennyMac LLC) (collectively "Defendants"). Smigelski's motion is directed at PennyMac LLC.

The operative first amended complaint (FAC) contains causes of action for overtime pay, failure to provide accurate wage statements, waiting time penalties and unfair business practices. In addition, there is a cause of action for civil penalties pursuant to the Private Attorney General Act (PAGA) codified in Labor Code § 2698 *et seq.* Smigelski brings the four non-PAGA causes of action on behalf of a "rate of pay" class and/or a "late pay" class. Smigelski defines the rate of pay class as:

All California-based current and former employees whom Defendants classified as "non-exempt" and whose rate of pay calculation for overtime purposes did not include (1) a draw; (2) referral bonus; (3)

variable rate bonus; or (4) benefit stipend, including, but not limited to, account executives, loan officers, and loan processors within the applicable limitations period.

(FAC, ¶ 14-a.) There is also a rate of pay subclass limited to former employees. The late pay class is defined as:

All California-based current and former employees whom Defendants classified as "non-exempt" and who received a payment of wages pursuant to a variable pay or referral bonus plan following their separation from Defendants' employ, including, but not limited to, account executives, loan officers, and loan processors within the applicable limitations period.

(*Id.*, ¶ 14-c.) The classes appear to comprise approximately 775 members. (See 12/10/19 McLoughlin Decl., ¶ 5.)

Smigelski filed this case in November 2015 and initially sought discovery in 2016. However, Defendants petitioned to compel arbitration and then appealed the Court's order denying the petition. This Court lost jurisdiction over the case until May 2019, when Defendants' unsuccessful appeals were exhausted.

On 8/19/19, Smigelski served PennyMac LLC with his first sets of requests for admissions and form interrogatories. At that time, he also served PennyMac LLC with his second sets of special interrogatories and requests for product of documents (RFPs). Smigelski granted PennyMac LLC a two-week extension on the deadline to respond, but PennyMac LLC's responses consisted mostly of objections. PennyMac LLC did produce some responsive documents, but it did not produce any ESI.

On 11/01/19, Smigelski's counsel served PennyMac LLC's counsel with a draft motion to compel. PennyMac LLC's counsel did not respond with respect to asserted defects in the responses to the form interrogatories, special interrogatories or RFPs. Despite ongoing efforts at an informal resolution, and elimination of certain disputes, counsel reached an impasse. This motion followed.

After Smigelski filed this motion, PennyMac LLC served some amended responses. Smigelski did not withdraw any of the motion.

The hearing on the motion was initially set for 12/27/19. The Court continued the hearing so that counsel could resume efforts at an informal resolution and then file a Joint Statement of outstanding issues. The order continuing the hearing contained the following remarks:

In resuming the meet-and-confer process, counsel should be guided by the observations that (1) absent the Complex-Civil Department's determination that discovery relating solely to the merits of putative class claims should be allowed immediately, this Court is unlikely to compel such discovery at the pre-certification stage. However, discovery that relates to merits and certification is generally allowable at the outset; (2) discovery of the merits of a PAGA claim is generally allowable at the outset; (3) counsel should jointly draft a *Belaire* opt-out notice and should attempt to stipulate to procedures for dissemination; (4) general objections to an entire set of written discovery are not allowed; (5) objections that discovery requests assume facts not in evidence or lack foundation are improper; (6) objections based on "undue burden" will not be sustained absent a showing that the burden of responding is genuinely oppressive; (7) one way to allay privacy concerns is to submit a stipulated protective order; and (8) the Discovery Act prescribes the proper form of a written response to a given discovery request. (See, e.g., CCP §§ 2030.210 *et seq.* and 2031.210 *et seq.*) Responses, therefore, should closely track the prescribed form.

On 2/06/20, the parties lodged their Joint Statement. Counsel were able to resolve many issues originally raised in the motion. To accommodate PennyMac LLC's concerns about absent class

members' privacy, counsel stipulated to a *Belaire* opt-out procedure. (See Supp. McLoughlin Decl., Exh. AB.)

The Court commends counsel for their efforts. Several issues, however, remain for decision. The Court addresses these issues below.

Discussion

The Court's analysis roughly tracks the order of discovery items enumerated in the Joint Statement.

Form Interrogatory 15.1

Form interrogatory 15.1 calls for PennyMac LLC to identify its denials of material allegations and its affirmative defenses, and then to set forth facts, witnesses, documents and contact information related to each denial or affirmative defense. PennyMac LLC served an amended response to this interrogatory on January 24, 2020. (See 2/06/20 Baker Decl., Exh 2.) Smigelski argues that the amended response is insufficient because (1) it retains general objections, including general objections based on various privileges; (2) it contains meritless, boilerplate objections; (3) it is substantively limited to Smigelski, as opposed to other members of the putative class or persons represented under PAGA; and (4) it is substantively incomplete.

PennyMac LLC counters that, as the amended response states, all currently known information has been provided. PennyMac LLC also argues that Smigelski's counsel failed to raise some of the current grievances during the meet-and-confer process.

PennyMac LLC's "Preliminary Statement and General Objections" preceding its amended response is improper. (See CCP § 2030.210(a)(3) [authorizing objections only to the "particular" interrogatory at issue].) PennyMac LLC must serve a further amended response to Form Interrogatory No. 15.1 that does not contain the Preliminary Statement and General Objections and does not otherwise purport to incorporate by reference generally applicable objections. That PennyMac LLC may have provided all currently known information in its response does not somehow legitimate unauthorized objections.

PennyMac LLC's objection based on the attorney-client privilege is overruled and must be omitted from the further amended response. Form Interrogatory 15.1 does not call for the production of any documents or the disclosure of any communications. Therefore, it does not implicate the attorney-client privilege.

Next, per the call of the interrogatory, PennyMac LLC must identify each denial of a material allegation in the FAC and state the facts, witnesses (and witness contact information) and documents (and contact information for those in possession) supporting that denial. The Court rejects PennyMac LLC's argument that Smigelski failed to meet and confer about this particular issue. (See 1/13/2020 Baker Decl., p.2 ["You will provide supplemental responses to Form Interrogatory Nos. 15.1, 17.1 ... Defendants must respond to the questions asked"].) Although PennyMac LLC parsed out its affirmative defenses in its most recently amended response to Form Interrogatory No. 15.1, it did not identify any of its denials of material allegations. Because PennyMac LLC answered by way of a general denial, it denied each material allegation in the FAC. (See, CCP § 431.30(d).) Hence, PennyMac LLC must identify each such denial and comply with the call of the interrogatory. With respect to Smigelski's class allegations in paragraphs 12 and 16 through 21 of the FAC, PennyMac LLC must respond with reference to classwide legal claims. As to other material allegations in the FAC, however, PennyMac LLC may tailor its response to the merits of Smigelski's individual claims. PennyMac LLC is not required at this time to provide discovery related solely to the merits of absent class members' claims. Also, because paragraphs 42 through 47 do not contain any material factual allegations about PAGA claims,

allegations in those paragraphs do not require PennyMac LLC to address the merits of any unnamed plaintiff's PAGA claims.

With respect to the affirmative defenses enumerated in PennyMac LLC's most recently amended response to Form Interrogatory No. 15.1, the response is deficient because it does not include the contact information called for in subdivisions (b) and (c) of the interrogatory. Except with respect to absent class members subject to the agreed-upon *Belaire* opt-out procedure, PennyMac LLC shall provide any current or last known telephone numbers and addresses for persons identified pursuant to these subdivisions. Smigelski's need for the information outweighs any privacy interests in keeping such information confidential.

Form Interrogatory No. 17.1

Form Interrogatory No. 17.1 calls for facts, witnesses and documents supporting each response, other than an unqualified admission, to concurrently served requests for admissions. PennyMac LLC served an amended response to this interrogatory when it served its response to Form Interrogatory No. 15.1. (See 2/06/20 Baker Decl., Exh. 2.) Smigelski argues that the amended response includes improper general and boilerplate objections. He also argues that the amended response is substantively incomplete.

PennyMac LLC counters again that it has provided all currently known information. PennyMac LLC likewise argues that Smigelski raises issues that were not raised during recent meet-and-confer efforts.

As reflected above, PennyMac LLC's "Preliminary Statement and General Objections" preceding its amended response is improper. (See CCP § 2030.210(a)(3).) PennyMac LLC must serve a further amended response that does not contain the Preliminary Statement and General Objections and does not otherwise purport to incorporate by reference generally applicable objections. That PennyMac LLC may have provided all currently known information in its response does not legitimate unauthorized objections.

PennyMac LLC's objection based on the attorney-client privilege is overruled and must be omitted from the further amended response. Form Interrogatory 17.1 does not call for the production of any documents or the disclosure of any communications.

With respect to the portions of PennyMac LLC's response that are directed at Requests for Admissions Nos. 1, 3, 5 and 7, PennyMac LLC must provide identified witnesses' contact information as well the names and contact information for those possessing the cited documents.

With respect to the portions of PennyMac LLC's response that are directed at Requests for Admissions Nos. 2, 4 and 6, PennyMac LLC does not have reasonably accessible data and is unsure where the data, if any, might be. PennyMac LLC need not supplement its response to Interrogatory No. 17.1 insofar as these three requests for admissions are concerned.

Special Interrogatory No. 16

Special Interrogatory No. 16 reads, "Please identify each of the 'numerous individual issues' which Defendant's Second Amended Answer alleges will predominate over and outweigh any common questions." PennyMac LLC amended its response to this interrogatory when it amended its response to the form interrogatories discussed above. (See 2/06/20 Baker Decl., Exh. 2.) The amended response contains a long but nonexhaustive list of purportedly predominating individual issues. Smigelski argues that the amended response is improperly limited to "denials, defenses and facts applicable to" Smigelski, as opposed to other class members. Smigelski also argues that incorporated general objections, as well

as certain specific objections, are improper.

PennyMac LLC counters that it has stated that it does not possess additional information. On that basis, it argues that the Court should not compel a further response.

The Court again notes that PennyMac LLC's "Preliminary Statement and General Objections" preceding its amended response is improper. PennyMac LLC must serve a further amended response that does not contain the Preliminary Statement and General Objections and does not otherwise purport to incorporate general objections by reference.

PennyMac LLC's objection based on the attorney-client privilege is overruled and must be omitted from the further amended response. Special Interrogatory No. 16 does not call for the production of any documents or the disclosure of any communications.

PennyMac LLC's qualification that its most recently amended response is limited to "denials, defenses and facts applicable to Plaintiff" is improper. Special Interrogatory No. 16 is directed at the viability of class treatment, not the merits of Smigelski's individual claims. This qualification must be removed from PennyMac LLC's further amended response.

Special Interrogatories Nos. 29 and 30 and RFPs 44 and 45

Special Interrogatory No. 29 calls for absent class members' identities, contact information and payroll information. Special Interrogatory No. 30 calls for the payroll information "in a native file excel spreadsheet or workbook[.]" In turn, RFPs 44 and 45 call for all documents "referred to or relied upon in answering" Special Interrogatories Nos. 29 and 30. RFPs 44 and 45 call for the production to be made "in either excel or in native format database or other structured data, about which the parties will meet and confer."

As noted above, counsel recently stipulated to a *Belaire* opt-out procedure to occur before absent class members' contact or personnel information is disclosed. Counsel also agreed that PennyMac would serve substantive responses to Special Interrogatories Nos. 29 and 30, as well as RFPs 44 and 45, after the *Belaire* process is completed. Nonetheless, Smigelski asks the court to compel further responses that omit certain objections and that include certain information. Among other things, Smigelski raises concerns about PennyMac LLC's claim that only a third-party vendor possesses payroll information for the period between November 2011 and April 2013.

The court will **not** compel further responses at this time. Smigelski may move for relief once PennyMac has served further responses upon completion of the stipulated *Belaire* procedure.

Special Interrogatory No. 33 and RFPs 23, 24 and 43

Special Interrogatory No. 33 reads: "Please identify each calculation used by Defendant to pay (or to offer to pay) employees in connection with the recalculation of overtime amounts in response to the claims alleged in the *Smigelski* or *Heidrich* cases." "*Heidrich, et. al v. PennyMac* is a federal court class/collective/PAGA action filed by Plaintiff's counsel in November 2016." (Jt. Stmt., p. 6, fn. 3.) RFPs 23, 34 and 43 read, respectively:

[23.] All DOCUMENTS, including COMMUNICATIONS and evidence of payments made, related to Defendant's cure of Labor Code violations, as described in Defendant's counsel's October 14, 2015 letter to the LWDA.

[24.] All DOCUMENTS, including COMMUNICATIONS, that relate to Defendant's review "of all of the

regular rate and overtime calculations for its Account Executives in California," as described in Defendant's counsel's October 14, 2015 letter to the LWDA.

[43.] All DOCUMENTS evidencing the recalculation of overtime amounts paid to employees in response to the claims alleged in the *Smigelski* or *Heidrich* cases, including but not limited to cover letters and settlement agreements to employees.

PennyMac LLCs' responses incorporated general objections. PennyMac LLC also raised specific objections to each of the subject discovery items, including a privacy objection. It also specifically objected on the basis that the discovery items are overbroad to the extent (a) they seek documents or information related to class members who have settled or must arbitrate, (b) they are aimed at the merits of absent class members' legal claims, or (c) they seek documents or information for periods beyond applicable statutes of limitations.

PennyMac LLC asserted in response to Special Interrogatory No. 33 that it was unable to provide any response at the time. It did not substantively respond to RFPs 23 or 43. "Subject to and without waiving" its objections to RFP 24, PennyMac LLC stated that it would produce responsive documents in its possession, custody or control.

Smigelski argues that amended responses, subject only to objections based on privacy or privilege, must be compelled. With respect to Special Interrogatory No. 33, Smigelski argues that PennyMac LLC has not performed a reasonable search for responsive information. He likewise argues PennyMac LLC has not properly responded to the RFPs by, among other things, indicating that it has performed a reasonable search and diligent inquiry. (See CCP § 2031.230 [representation of inability to comply with an RFP must include affirmation that a diligent inquiry and reasonable search have been made].)

PennyMac LLC asks the Court to defer any ruling on the subject discovery items until the *Belaire* notice procedure has been completed. Because these items call for information that the *Belaire* procedure is designed to protect, the request is granted. The court will **not** compel further responses at this time.

After the *Belaire* procedure is completed, PennyMac LLC must serve further responses that omit any reference to general objections. The amended response to Special Interrogatory No. 33 may only retain objections based on privacy and overbreadth, and it must otherwise strictly comply with CCP §§ 2030.210-2030.250. When PennyMac LLC serves its amended response to Special Interrogatory No. 33, an appropriate agent of the company shall concurrently serve a declaration explaining the steps reasonably taken to locate responsive information.

With respect to RFPs 23, 24 and 43, PennyMac may retain only objections based on a privilege, privacy and overbreadth. The amended responses must otherwise strictly comply with CCP §§ 2031.210-2031.250.

To the extent Smigelski seeks an order compelling a production of documents responsive to RFP 24, the request is denied without prejudice as premature. PennyMac LLC must first provide a written response that is not conditioned on improper objections. Then, if it fails to produce promised documents, Smigelski may secure a production. (See CCP § 3031.320(a).)

Review of Class Members' Identities and Contact Information

At this point, counsel have agreed to a *Belaire* procedure that entitles only Smigelski and his counsel to make use of the names and contact information of absent class members who do not opt out. A dispute has arisen over the propriety of allowing other putative class members to review this information and contact their fellow class members to facilitate the litigation. The Court declines to address this dispute

at this point. Counsel shall comply with the agreement in place, but may move for appropriate relief by way of a separate motion.

Privilege Log

Despite having asserted the attorney-client privilege to numerous RFPs, PennyMac LLC refuses to serve a privilege log. PennyMac LLC argues that any responsive documents that are privileged are "clearly" privileged and, therefore, need not be included in a privilege log. The argument is not persuasive. CCP § 2031.240(c) now provides that, in response to an objection on a claim of privilege or attorney work product, the party withholding documents must provide sufficient factual information for other parties to evaluate the merits of that claim, including if necessary, a privilege log. The statute does not carve out an exception for "clearly" privileged material. Indeed, "The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [Citations.] Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. [Citations.]" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) To be able to fully evaluate a privilege, PennyMac LLC must produce a privilege log describing the documents withheld based on the claimed privilege.

Hence, with the exception of responsive, privileged documents in PennyMac LLC's litigation file generated in this case, PennyMac LLC must list responsive but privileged documents in a privilege log. The log must identify (1) the privilege asserted, (2) the author/creator and that person's title or capacity, (3) any recipient and that person's title or capacity, (4) the date of creation, (5) the date of any transmission or delivery, and (6) the title or general nature of the document.

If PennyMac LLC determines that there are no responsive documents to a given RFP, then it shall withdraw any objection to the RFP based on privilege.

On the separate issue whether PennyMac LLC must list in a privilege log documents withheld based on privacy, the Court will not order PennyMac to create such a log at this time. After the *Belaire* procedure has been completed, if PennyMac LLC withholds entire responsive documents based on privacy - as opposed to produces private documents in redacted form - then it must list those documents in the privilege log.

ESI / RFPs 9, 11, 13, 15, 17, 19 and 30-33

With respect to the following RFPs, Smigelski argues that PennyMac LLC has refused to produce responsive ESI in either the format(s) requested in instructions preceding the RFPs or in any format that includes metadata: RFPs 4, 6, 7, 9, 11, 13, 15, 17, 19, 23, 24, 27, 30-36, 39, and 43-45. Smigelski nonetheless asserts that some agreement has been reached with respect to many of these RFPs, i.e., 9, 11, 13, 15, 17, 19 and 30-33. As noted above, the court awaits counsel's update on the status of these issues.

RFPs 5 and 6

RPFs 5 and 6 call for agreements with absent class members and communications related to such agreements. The parties agree that the Court need not act on these RFPs until the *Belaire* procedure has run its course. Accordingly, the court does not rule on the RFPs at this time.

RFP 21

RFP 21 calls for "an exemplar wage statement from the first pay period in which Defendant issued a wage statement with a changed form from those issued to Plaintiff." PennyMac LLC asserts that the parties are likely to resolve this dispute by the time of hearing. Counsel shall address their progress at the time of hearing.

RFP 22

RFP 22 calls for:

All wage statements Defendant issued since October 17, 2011, for pay periods which Defendant determined it incorrectly paid the employee, including those discovered in Defendant's review "of all of the regular rate and overtime calculations for its Account Executives in California," as described in Defendant's counsel's October 14, 2015 letter to the LWDA.

PennyMac LLC has not served a substantive response. Instead, it incorporated general objections and raised specific objections based on privacy, overbreadth, relevance and undue burden. PennyMac LLC asserts that it will produce responsive wage statements, or wage data in a spreadsheet, once the *Belaire* process is complete.

During the meet-and-confer process, counsel agreed that PennyMac LLC could wait until after the *Belaire* process is complete to produce responsive documents. The parties disagree, however, whether a substantive written response, without improper objections, should be served now.

Once the *Belaire* process is complete, PennyMac LLC shall serve an amended response that retains only specific objections based on privacy and overbreadth. Subject to these objections, PennyMac LLC shall serve an amended response that strictly complies with CCP §§ 2031.210-2031.250.

RFP 39

RFP 39 calls for "all DOCUMENTS identified in response to any and all of the interrogatories served at the same time as these requests." Subject only to the general objections, PennyMac LLC responded that it would produce all non-privilege, responsive documents in its possession, custody or control.

PennyMac LLC must serve a further amended response that does not incorporate the general objections.

Smigelski's request for a production of documents is denied without prejudice as premature. PennyMac LLC must first provide a written response that is not conditioned on improper objections. If PennyMac LLC then fails to produce promised documents, Smigelski may secure a production. (See CCP § 2031.320(a).)

Sanctions

Smigelski has obtained much of the relief he sought when he initially filed the motion. PennyMac LLC was not substantially justified in its initial responses, which contained numerous improper objections and were, on the whole, substantively deficient. Because circumstances do not otherwise render an award of fees and costs unjust, the Court grants Smigelski's request for reasonable fees and costs. (See CCP §§ 2030.300(d); 2031.310(h).) That being said, Smigelski's counsel's stated hourly rate of $875, and the request for $4,900 in fees and costs, are excessive.

Applying a reasonable hourly rate of $450, the Court awards Smigelski **$2,700** for six hours of attorney

time. A higher hourly rate is not appropriate for work on a discovery motion, even in a class action setting.

Disposition

The motion is granted in part and denied in part on the terms above. Where PennyMac is ordered to serve further written responses without regard to the *Belaire* process, it shall do so no later than March 23, 2020. Where PennyMac LLC is ordered to serve a further response after the *Belaire* process is completed, it shall do so no later than 30 days after the last day class members may opt-out.

PennyMac LLC shall pay the $2,700 sanction no later than March 23, 2020. If PennyMac LLC fails to pay the sanction by such date, then it may lodge for the Court's signature a formal order awarding sanctions, which may be enforced as a separate judgment. (See *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 615.)

COURT RULING

The matter was argued and submitted as fully stated on the record.

The matter was taken under submission.

SUBMITTED MATTER RULING

Having taken the matter under submission, the Court now adopts and republishes its tentative ruling with certain modifications and additions, as set forth below:

Plaintiff Richard Smigelski's (Smigelski) motion to compel further responses to form interrogatories, special interrogatories and document requests is GRANTED in part and DENIED in part.

Overview

This is a putative wage and hour class action. Smigelski is the sole named plaintiff. The named defendants are PennyMac Financial Services, Inc., PennyMac Mortgage Investment Trust, and Private National Mortgage Acceptance Company, LLC (PennyMac LLC) (collectively "Defendants"). Smigelski's motion is directed at PennyMac LLC.

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(FAC, ¶ 14-a.) There is also a rate of pay subclass limited to former employees. The late pay class is defined as:

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separation from Defendants' employ, including, but not limited to, account executives, loan officers, and loan processors within the applicable limitations period.

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The Court commends counsel for their efforts. Several issues, however, remain for decision. The Court addresses these issues below.

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PennyMac LLC's objection based on the attorney-client privilege is overruled and must be omitted from the further amended response. Form Interrogatory 15.1 does not call for the production of any documents or the disclosure of any communications. Therefore, it does not implicate the attorney-client privilege.

Next, per the call of the interrogatory, PennyMac LLC must identify each denial of a material allegation in the FAC and state the facts, witnesses (and witness contact information) and documents (and contact information for those in possession) supporting that denial. The Court rejects PennyMac LLC's argument that Smigelski failed to meet and confer about this particular issue. (See 1/13/2020 Baker Decl., p.2 ["You will provide supplemental responses to Form Interrogatory Nos. 15.1, 17.1 ... Defendants must respond to the questions asked"].) Although PennyMac LLC parsed out its affirmative defenses in its most recently amended response to Form Interrogatory No. 15.1, it did not identify any of its denials of material allegations. Because PennyMac LLC answered by way of a general denial, it denied each material allegation in the FAC. (See, CCP § 431.30(d).) Hence, PennyMac LLC must identify each such denial and comply with the call of the interrogatory. With respect to Smigelski's class allegations in paragraphs 12 and 16 through 21 of the FAC, PennyMac LLC must respond with reference to classwide legal claims. As to other material allegations in the FAC, however, PennyMac LLC may tailor its response to the merits of Smigelski's individual claims. PennyMac LLC is not required at this time to provide discovery related solely to the merits of absent class members' claims. Also, because paragraphs 42 through 47 do not contain any material factual allegations about PAGA claims, allegations in those paragraphs do not require PennyMac LLC to address the merits of any unnamed plaintiff's PAGA claims.

With respect to the affirmative defenses enumerated in PennyMac LLC's most recently amended response to Form Interrogatory No. 15.1, the response is deficient because it does not include the contact information called for in subdivisions (b) and (c) of the interrogatory. Except with respect to absent class members subject to the agreed-upon *Belaire* opt-out procedure, PennyMac LLC shall provide any current or last known telephone numbers and addresses for persons identified pursuant to

these subdivisions. Smigelski's need for the information outweighs any privacy interests in keeping such information confidential.

Form Interrogatory No. 17.1

Form Interrogatory No. 17.1 calls for facts, witnesses and documents supporting each response, other than an unqualified admission, to concurrently served requests for admissions. PennyMac LLC served an amended response to this interrogatory when it served its response to Form Interrogatory No. 15.1. (See 2/06/20 Baker Decl., Exh. 2.) Smigelski argues that the amended response includes improper general and boilerplate objections. He also argues that the amended response is substantively incomplete.

PennyMac LLC counters again that it has provided all currently known information. PennyMac LLC likewise argues that Smigelski raises issues that were not raised during recent meet-and-confer efforts.

As reflected above, PennyMac LLC's "Preliminary Statement and General Objections" preceding its amended response is improper. (See CCP § 2030.210(a)(3).) PennyMac LLC must serve a further amended response that does not contain the Preliminary Statement and General Objections and does not otherwise purport to incorporate by reference generally applicable objections. That PennyMac LLC may have provided all currently known information in its response does not legitimate unauthorized objections.

PennyMac LLC's objection based on the attorney-client privilege is overruled and must be omitted from the further amended response. Form Interrogatory 17.1 does not call for the production of any documents or the disclosure of any communications.

With respect to the portions of PennyMac LLC's response that are directed at Requests for Admissions Nos. 1, 3, 5 and 7, PennyMac LLC must provide identified witnesses' contact information as well the names and contact information for those possessing the cited documents.

With respect to the portions of PennyMac LLC's response that are directed at Requests for Admissions Nos. 2, 4 and 6, PennyMac LLC does not have reasonably accessible data and is unsure where the data, if any, might be. As to these three requests, PennyMac LLC need not amend its response to Interrogatory No. 17.1(a), which calls for supporting facts. However, PennyMac LLC must serve an amended response which, pursuant to Form Interrogatory No. 17.1(b), identifies all witnesses with knowledge about PennyMac LLC's inability to access the data, as well as those witnesses' contact information. PennyMac LLC must also amend its response to subd. (c), which requires it to identify documents substantiating the asserted inability to access responsive data as well as the contact information of persons possessing such documents.

Special Interrogatory No. 16

Special Interrogatory No. 16 reads, "Please identify each of the 'numerous individual issues' which Defendant's Second Amended Answer alleges will predominate over and outweigh any common questions." PennyMac LLC amended its response to this interrogatory when it amended its response to the form interrogatories discussed above. (See 2/06/20 Baker Decl., Exh. 2.) The amended response contains a long but nonexhaustive list of purportedly predominating individual issues. Smigelski argues that the amended response is improperly limited to "denials, defenses and facts applicable to" Smigelski, as opposed to other class members. Smigelski also argues that incorporated general objections, as well as certain specific objections, are improper.

PennyMac LLC counters that it has stated that it does not possess additional information. On that basis,

it argues that the Court should not compel a further response.

The Court again notes that PennyMac LLC's "Preliminary Statement and General Objections" preceding its amended response is improper. PennyMac LLC must serve a further amended response that does not contain the Preliminary Statement and General Objections and does not otherwise purport to incorporate general objections by reference.

PennyMac LLC's objection based on the attorney-client privilege is overruled and must be omitted from the further amended response. Special Interrogatory No. 16 does not call for the production of any documents or the disclosure of any communications.

PennyMac LLC's qualification that its most recently amended response is limited to "denials, defenses and facts applicable to Plaintiff" is improper. Special Interrogatory No. 16 is directed at the viability of class treatment, not the merits of Smigelski's individual claims. This qualification must be removed from PennyMac LLC's further amended response.

Special Interrogatories Nos. 29 and 30 and RFPs 44 and 45

Special Interrogatory No. 29 calls for absent class members' identities, contact information and payroll information. Special Interrogatory No. 30 calls for the payroll information "in a native file excel spreadsheet or workbook[.]" In turn, RFPs 44 and 45 call for all documents "referred to or relied upon in answering" Special Interrogatories Nos. 29 and 30. RFPs 44 and 45 call for the production to be made "in either excel or in native format database or other structured data, about which the parties will meet and confer."

As noted above, counsel recently stipulated to a *Belaire* opt-out procedure to occur before absent class members' contact or personnel information is disclosed. Counsel also agreed that PennyMac would serve substantive responses to Special Interrogatories Nos. 29 and 30, as well as RFPs 44 and 45, after the *Belaire* process is completed. Nonetheless, Smigelski asks the court to compel further responses that omit certain objections and that include certain information. Among other things, Smigelski raises concerns about PennyMac LLC's claim that only a third-party vendor possesses payroll information for the period between November 2011 and April 2013.

The court will **not** compel further responses at this time. Smigelski may move for relief once PennyMac has served further responses upon completion of the stipulated *Belaire* procedure.

Special Interrogatory No. 33 and RFPs 23, 24 and 43

Special Interrogatory No. 33 reads: "Please identify each calculation used by Defendant to pay (or to offer to pay) employees in connection with the recalculation of overtime amounts in response to the claims alleged in the *Smigelski* or *Heidrich* cases." "*Heidrich, et. al v. PennyMac* is a federal court class/collective/PAGA action filed by Plaintiff's counsel in November 2016." (Jt. Stmt., p. 6, fn. 3.) RFPs 23, 34 and 43 read, respectively:

[23.] All DOCUMENTS, including COMMUNICATIONS and evidence of payments made, related to Defendant's cure of Labor Code violations, as described in Defendant's counsel's October 14, 2015 letter to the LWDA.

[24.] All DOCUMENTS, including COMMUNICATIONS, that relate to Defendant's review "of all of the regular rate and overtime calculations for its Account Executives in California," as described in Defendant's counsel's October 14, 2015 letter to the LWDA.

[43.] All DOCUMENTS evidencing the recalculation of overtime amounts paid to employees in response to the claims alleged in the *Smigelski* or *Heidrich* cases, including but not limited to cover letters and settlement agreements to employees.

PennyMac LLCs' responses incorporated general objections. PennyMac LLC also raised specific objections to each of the subject discovery items, including a privacy objection. It also specifically objected on the basis that the discovery items are overbroad to the extent (a) they seek documents or information related to class members who have settled or must arbitrate, (b) they are aimed at the merits of absent class members' legal claims, or (c) they seek documents or information for periods beyond applicable statutes of limitations.

PennyMac LLC asserted in response to Special Interrogatory No. 33 that it was unable to provide any response at the time. It did not substantively respond to RFPs 23 or 43. "Subject to and without waiving" its objections to RFP 24, PennyMac LLC stated that it would produce responsive documents in its possession, custody or control.

Smigelski argues that amended responses, subject only to objections based on privacy or privilege, must be compelled. With respect to Special Interrogatory No. 33, Smigelski argues that PennyMac LLC has not performed a reasonable search for responsive information. He likewise argues PennyMac LLC has not properly responded to the RFPs by, among other things, indicating that it has performed a reasonable search and diligent inquiry. (See CCP § 2031.230 [representation of inability to comply with an RFP must include affirmation that a diligent inquiry and reasonable search have been made].)

PennyMac LLC asks the Court to defer any ruling on the subject discovery items until the *Belaire* notice procedure has been completed. Because these items call for information that the *Belaire* procedure is designed to protect, the request is granted. The court will **not** compel further responses at this time.

After the *Belaire* procedure is completed, PennyMac LLC must serve further responses that omit any reference to general objections. The amended response to Special Interrogatory No. 33 may only retain objections based on privacy and overbreadth, and it must otherwise strictly comply with CCP §§ 2030.210-2030.250. When PennyMac LLC serves its amended response to Special Interrogatory No. 33, an appropriate agent of the company shall concurrently serve a declaration explaining the steps reasonably taken to locate responsive information.

With respect to RFPs 23, 24 and 43, PennyMac may retain only objections based on a privilege, privacy and overbreadth. The amended responses must otherwise strictly comply with CCP §§ 2031.210-2031.250.

To the extent Smigelski seeks an order compelling a production of documents responsive to RFP 24, the request is denied without prejudice as premature. PennyMac LLC must first provide a written response that is not conditioned on improper objections. Then, if it fails to produce promised documents, Smigelski may secure a production. (See CCP § 3031.320(a).)

Review of Class Members' Identities and Contact Information

At this point, counsel have agreed to a *Belaire* procedure that entitles only Smigelski and his counsel to make use of the names and contact information of absent class members who do not opt out. A dispute has arisen over the propriety of allowing other putative class members to review this information and contact their fellow class members to facilitate the litigation. The Court declines to address this dispute at this point. Counsel shall comply with the agreement in place, but may move for appropriate relief by way of a separate motion.

Privilege Log

Despite having asserted the attorney-client privilege to numerous RFPs, PennyMac LLC refuses to serve a privilege log. PennyMac LLC argues that any responsive documents that are privileged are "clearly" privileged and, therefore, need not be included in a privilege log. The argument is not persuasive. CCP § 2031.240(c) now provides that, in response to an objection on a claim of privilege or attorney work product, the party withholding documents must provide sufficient factual information for other parties to evaluate the merits of that claim, including if necessary, a privilege log. The statute does not carve out an exception for "clearly" privileged material. Indeed, "The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [Citations.] Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. [Citations.]" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) To be able to fully evaluate a privilege, PennyMac LLC must produce a privilege log describing the documents withheld based on the claimed privilege.

Hence, with the exception of (1) draft pleadings, draft discovery requests and draft discovery responses, and (2) its attorney-client services agreement(s) governing this litigation, PennyMac LLC must list responsive but privileged documents in a privilege log. The log must identify (1) the privilege asserted, (2) the author/creator and that person's title or capacity, (3) any recipient and that person's title or capacity, (4) the date of creation, (5) the date of any transmission or delivery, and (6) the title or general nature of the document.

If PennyMac LLC determines that there are no responsive documents to a given RFP, then it shall withdraw any objection to the RFP based on privilege.

On the separate issue whether PennyMac LLC must list in a privilege log documents withheld based on privacy, the Court will not order PennyMac to create such a log at this time. After the *Belaire* procedure has been completed, if PennyMac LLC withholds entire responsive documents based on privacy - as opposed to produces private documents in redacted form - then it must list those documents in the privilege log.

ESI / RFPs 9, 11, 13, 15, 17, 19 and 30-33

With respect to these RFPs, pursuant to the Court's discussion with counsel at oral argument: (1) no later than March 5, 2020, the parties shall establish their joint list of custodians whose ESI will be searched; (2) No later than April 1, 2020, the parties shall establish their joint list of terms to search the ESI; and (3) PennyMac LLC shall then produce responsive ESI no later than June 1, 2020. If the parties are unable to agree upon a list of custodians or a list of search terms, then they shall lodge their separate lists, by the date the joint list is otherwise due, and the Court will make appropriate orders. If PennyMac LLC is unable to comply with the June 1 deadline for the production, then counsel shall met and confer about a new deadline(s) and, failing that, shall obtain a new deadline from the court by placing the matter on Department 53's 9:00 a.m. *ex parte* calendar. (See Local Rule 2.35.)

The Court makes no further ruling at this time. If additional issues arise in connection with ESI or the RFPs at issue, either party may make a further motion and place the matter on Department 53's 2:00 p.m. calendar.

RFPs 5 and 6

RPFs 5 and 6 call for agreements with absent class members and communications related to such agreements. The parties agree that the Court need not act on these RFPs until the *Belaire* procedure has run its course. Accordingly, the court does not rule on the RFPs at this time.

RFP 21

RFP 21 calls for "an exemplar wage statement from the first pay period in which Defendant issued a wage statement with a changed form from those issued to Plaintiff." PennyMac LLC asserts that the parties are likely to resolve this dispute by the time of hearing. Counsel shall address their progress at the time of hearing.

RFP 22

RFP 22 calls for:

All wage statements Defendant issued since October 17, 2011, for pay periods which Defendant determined it incorrectly paid the employee, including those discovered in Defendant's review "of all of the regular rate and overtime calculations for its Account Executives in California," as described in Defendant's counsel's October 14, 2015 letter to the LWDA.

PennyMac LLC has not served a substantive response. Instead, it incorporated general objections and raised specific objections based on privacy, overbreadth, relevance and undue burden. PennyMac LLC asserts that it will produce responsive wage statements, or wage data in a spreadsheet, once the *Belaire* process is complete.

During the meet-and-confer process, counsel agreed that PennyMac LLC could wait until after the *Belaire* process is complete to produce responsive documents. The parties disagree, however, whether a substantive written response, without improper objections, should be served now.

Once the *Belaire* process is complete, PennyMac LLC shall serve an amended response that retains only specific objections based on privacy and overbreadth. Subject to these objections, PennyMac LLC shall serve an amended response that strictly complies with CCP §§ 2031.210-2031.250.

RFP 39

RFP 39 calls for "all DOCUMENTS identified in response to any and all of the interrogatories served at the same time as these requests." Subject only to the general objections, PennyMac LLC responded that it would produce all non-privilege, responsive documents in its possession, custody or control.

PennyMac LLC must serve a further amended response that does not incorporate the general objections.

Smigelski's request for a production of documents is denied without prejudice as premature. PennyMac LLC must first provide a written response that is not conditioned on improper objections. If PennyMac LLC then fails to produce promised documents, Smigelski may secure a production. (See CCP § 2031.320(a).)

Sanctions

Smigelski has obtained much of the relief he sought when he initially filed the motion. PennyMac LLC was not substantially justified in its initial responses, which contained numerous improper objections and were, on the whole, substantively deficient. Because circumstances do not otherwise render an award

of fees and costs unjust, the Court grants Smigelski's request for reasonable fees and costs. (See CCP §§ 2030.300(d); 2031.310(h).) That being said, Smigelski's counsel's stated hourly rate of $875, and the request for $4,900 in fees and costs, are excessive.

Applying a reasonable hourly rate of $450, the Court awards Smigelski **$2,700** for six hours of attorney time. A higher hourly rate is not appropriate for work on a discovery motion, even in a class action setting.

Disposition

The motion is granted in part and denied in part on the terms above. Where PennyMac is ordered to serve further written responses without regard to the *Belaire* process, it shall do so no later than March 23, 2020. Where PennyMac LLC is ordered to serve a further response after the *Belaire* process is completed, it shall do so no later than 30 days after the last day class members may opt-out.

PennyMac LLC shall pay the $2,700 sanction no later than March 23, 2020. If PennyMac LLC fails to pay the sanction by such date, then it may lodge for the Court's signature a formal order awarding sanctions, which may be enforced as a separate judgment. (See *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 615.)

The minute order is effective immediately. No formal order pursuant to Cal. R. Ct. 3.1312 is required.

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