EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER WELLER, on behalf of himself and all others similarly situated	:	**CIVIL ACTION**
v.	:	**NO. 17-2292**
DOLLAR GENERAL CORPORATION; DOLGENCORP, LLC	:	

O R D E R

AND NOW, this 5th day of August, 2019, upon consideration of Defendants' Objections to the Memorandum of United States Magistrate Judge Timothy R. Rice [ECF 69] and all responses and replies thereto, it is hereby **ORDERED** that the Objections are **DENIED without prejudice** and the matter is **REMANDED** to the Magistrate Judge to conduct an evidentiary hearing pursuant to the decision of the United States Supreme Court in ***Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981)**.[1]

[1] Plaintiff brought this proposed collective action, individually and on behalf of others similarly situated against Defendants Dollar General Corp. and Dolgencorp, LLC. (collectively, "Dolgencorp"), under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. Plaintiff also filed a proposed Fed. R. Civ. P. 23 class action, asserting claims under the Pennsylvania Minimum Wage Act of 1968, 43 P.S. 333.101, et seq., the Pennsylvania Wage Payment and Collection Law, 43 P.S. 260.1, et seq. and common law unjust enrichment. Following completion of discovery on the issue of class certification, the Plaintiff sought certification concerning his Fed. R. Civ. P. 23 state law claims of an opt-out class consisting of "non-exempt, hourly employee[s]" in Pennsylvania from May 18, 2013 until the present. (ECF 36 at 4). Counsel for Dolgencorp subsequently visited Dolgencorp's distribution center in Bethel, Pennsylvania where counsel interviewed various employees, and obtained declarations from some of them to support Dolgencorp's opposition to Plaintiff's motion for class certification. Dolgencorp then filed its opposition to the motion for class certification. Attached to the opposition were 16 declarations from hourly employees at the Bethel Distribution Center, charts summarizing information provided by the declarants, and four declarations from certain supervisory employees at Bethel Distribution Center. (ECF 45, Exs. 1B-1F, 3-18) Dolgencorp had failed to identify any of the 20 declarants in its initial disclosures or supplements to its disclosures. Plaintiff subsequently filed a Motion to Strike and for Sanctions against Dolgencorp. The Court referred the Motion to the Magistrate Judge.

As noted by the Magistrate Judge, Plaintiff's motion contended that "witness declarations filed by Dolgencorp in response to Plaintiff's motion for class certification and conditional class certification were obtained through improper ex parte communications and/or that Dolgencorp never disclosed the declarants as required by Fed. R. Civ. P. 26." (ECF 63 at 1). The Magistrate Judge concluded that Dolgencorp "improperly communicated with the putative class members before certification was decided" and imposed sanctions, including allowing Plaintiff to depose the declarants and any other hourly employees interviewed by Dolgencorp's counsel and ordering Dolgencorp to pay costs and expenses relating to such depositions. (*Id.*)The Magistrate Judge concluded that the ex parte communications violated Pa. R.P.C. 4.2 (lawyer "shall not communicate about the subject of the representation with a

party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so") and E.D. Pa. Civ. P. 83.6 IV.B (adopting Pennsylvania Rules of Professional Conduct as Rules of Professional Conduct in the U.S. District Court for the Eastern District of Pennsylvania).

Under Pennsylvania law governing state class actions, putative class members are considered as parties while a motion for certification is pending. Pa. R. Civ. P. 1701(a) (a class action is defined as "any action brought by or against parties as representatives of a class until the court by order refuses to certify it as such or revokes a prior certification under these rules.") *Dondore v. NGK Metals Corp*., 152 F. Supp. 2d 662, 666–66 (E.D. Pa. 2001) (Pennsylvania Rules of Professional Conduct "prohibit defense counsel from contacting or interviewing potential witnesses who are putative class members . . . without the consent of counsel for the named plaintiffs in that action"); *Braun v. Wal-Mart Stores, Inc*., No. 3127-2002, 2003 WL 1847695, *2–*3 (C.C.P. Jan. 15, 2003) ("under Pennsylvania law putative class members are parties to the action until the court declines to certify the action" and should be afforded the protections of the Rules of Professional Conduct); *Bell v. Beneficial Consumer Discount Co, 348 A. 2d 734, 736 (Pa. 1975); see also* Phila. Bar Assn. Prof. Guid. Comm., Ethics Op. 2009-1, 2009 WL 964148, at *2 (April 1, 2009) ("Pennsylvania courts have interpreted [Pennsylvania Rule of Professional Conduct] 4.2 as barring defense counsel in a state class action from contacting current or former employee class members regarding the subject matter of the lawsuit prior to a decision on certification (unless accomplished via deposition or other formal means of discovery with proper notice provided to the plaintiff's counsel).") (citing authority).

In an argument that it did not raise before the Magistrate Judge but now raises for the first time in its Objections to the Magistrate Judge's report, Dolgencorp argues that although Plaintiff's Fed. R. Civ. 23 class action involves only Pennsylvania state law claims, it is nevertheless venued in federal court, not state court, and therefore federal procedural law must govern. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Under federal law, a putative class member is not considered a represented party while a motion for class certification is pending. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593, (2013) (stating that "'a nonnamed class member is [not] a party to the class-action litigation *before the class is certified*'") (brackets and italics in original) (quoting *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379, 180 L. Ed. 2d 341 (2011)). Without "party status," putative class members in federal court cannot be deemed to be "represented" by the named plaintiff's attorney. *In re Community Bank of Northern Virginia*, 418 F.3d 277, 313 (3d Cir. 2005) (concluding that "class counsel do not possess a traditional attorney-client relationship with absent [Rule 23] class members."); *Walney v.Swepi LP,* 2017 WL 31980, at *13 (W.D. Pa. January 23, 2017)("Thus, *Community Bank of Northern Virginia* suggests that the Third Circuit Court of Appeals would recognize some kind of fiduciary relationship between class counsel and absent class members during the opt-out period, though perhaps something less than the traditional attorney-client relationship; *Fried v. SunGard Recovery Sys*., No. 95-0878, 1995 U.S. Dist. LEXIS 2518 (E.D. Pa. Feb. 22, 1995). Since a putative class member is not considered a represented party in a Fed. R. Civ. P. 23 proceeding in federal court, neither Pa. R.P.C. 4.2 nor E.D. Pa. Civ. P. 83.6 IV B, both of which apply only to represented parties, are applicable.

Instead, "[u]nder [Fed. R. Civ. P]. 23(d), a district court has a duty to 'safeguard class members from unauthorized [and] misleading communications from the parties and their counsel.'" *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 541 Fed.Appx. 181, 186 (3d Cir. 2013) (quoting *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 310 (3d Cir. 2005)) (alteration in original). To that end, "a court may enter orders necessary to protect the integrity of the litigation." *Id.*at 186 (citing *Cmty. Bank*, 418 F.3d at 310). In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Supreme Court held that federal district courts cannot restrict the parties or their counsel in a class action from communicating with Fed. R. Civ. P. 23 putative class members, unless the speech restriction "is justified by a likelihood of serious abuses" and 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." 452 U.S. at 101, 104. While acknowledging that federal district courts have "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," the Supreme Court cautioned that "this discretion is not unlimited" and must be

balanced with "the rights of the parties," including their First Amendment rights to free expression without serious restraints. *Id*. at 101–02. Indeed, this very Magistrate Judge previously performed a *Gulf Oil* analysis in denying the defendant's motion to interview members of a putative class. *Faloney v. Wachovia Bank, N.A.*, 2008 WL 11366235, at *1 (E.D. Pa. July 28, 2008); *See also*, *Gauzza v. Prospect Med. Holdings, Inc.*, 2018 WL 4853294, at *1 (E.D. Pa. Oct. 4, 2018) (concluding in a case containing a FLSA collective class action claim and PMWA class action claim that "restrictions on parties' communications with potential class members should address 'potential abuse[ ]' and be based on 'a weighing of the need for a limitation and the potential interference with the rights of the parties'") (quoting *Gulf Oil*, 452 U.S. at 101-02); *Katz v. DNC Servs. Corp.*, 275 F. Supp. 3d 579, 582 (E.D. Pa. 2017) (relying on *Gulf Oil* to restrict communications between plaintiff's counsel and potential class members in lawsuit alleging FLSA and PMWA claims). *Webb v. Discover Property & Casualty Ins. Co*., No. 08-1607, 2008 U.S. Dist. LEXIS 95431 (M.D. Pa. Nov. 24, 2008)).

The Plaintiff relies on an earlier decision from another member of this Court in *Gates v. Rohm and Haas Co.*, No. 06-1743, 2006 WL 3420591 (E.D. Pa. Nov. 22. 2006). In that case, the plaintiffs asserted federal and state class action claims against a pharmaceutical company for damages allegedly stemming from environmental contamination. Id. at *2. The company moved to compel plaintiffs' counsel to produce information and documents pertaining to public meetings between plaintiffs' counsel and putative class members. *See id*. at *2-5. In response to the motion, the District Judge ordered plaintiffs' counsel to provide the company and its lawyers with a list of the putative class members who attended the meetings. *See id*. at *7. In a footnote, the District Judge *sua sponte* instructed the company and its lawyers that Rule 4.2 prohibited them from contacting and interviewing the putative class members as represented parties until a decision was made on class certification:

> However, at this time, Defendants are prohibited from contacting and interviewing putative class members. The Pennsylvania Rules of Professional Conduct provide that "a lawyer shall not communicate about the subject of the presentation with a party that lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Pa. Rules Prof'l Conduct R. 4.2; E.D. Pa. Civ. P. 83.6, R.IV. Under Pennsylvania law, putative class members "are more properly characterized as parties to the action." *Bell v. Beneficial Consumer Discount Co*., 465 Pa. 225, 348 A.2d 734, 736 (Pa. 1975). As parties to the action, putative class members are afforded the protections contained in Rule 4.2 of the Rules of Professional Conduct. *Dondore v. NGK Metals Corp*., 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001). Therefore, at least for the time-being, defense counsel is prohibited from contacting or interviewing "potential witnesses who are putative class members." *Id.*

Id. at *7 n. 2.

In the first instance, the issue of whether defense counsel could contact and interview putative class members was not before the Court and was never briefed by the parties. Therefore, it appears that any statement on this issue by the Court in *Gates* was dicta. More importantly, in stating that putative class members are parties and therefore protected by Rule 4.2, the District Judge relied on Pennsylvania law (citing Bell), instead of on federal law which governed the class action before it. In addition, although the *Dondore* decision cited by the District Judge was a federal court decision**,** the Court in *Dondore* was commenting only on a parallel class action that was pending in Pennsylvania state court, not on the individual diversity claims that comprised the federal court action**.** Therefore, it appears the District Judge's reliance on *Dondore* was misplaced.

BY THE COURT:

s/s JEFFREY L. SCHMEHL, J.
JEFFREY L. SCHMEHL, J.

Accordingly, this matter will be remanded to the Magistrate Judge for the purpose of conducting an evidentiary hearing under *Gulf Oil*, *supra*. After doing so, the Magistrate Judge may ultimately reach the same conclusion, but at least he will have done so after properly performing a *Gulf Oil* analysis. In this regard, the Court notes that this whole situation could have been avoided had Dolgencorp, given its knowledge of the tenets of *Gulf Oil*, sought leave of this court to meet with putative class members prior to unilaterally interviewing them. Dolgencorp's failure to do so can be addressed by the Magistrate Judge as part of his *Gulf Oil* analysis.