

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

<p>JAN MACLEOD, Individually and on behalf of all others similarly situated</p> <p style="text-align:center">Plaintiff</p> <p style="text-align:center">vs.</p> <p>JENNER’S POND, INC. d/b/a, a/k/a JENNER’S POND RETIREMENT COMMUNITY,</p> <p style="text-align:center">Defendant.</p>	<p>No. 2:20-cv-03485-ER</p>
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**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR EMERGENCY
RELIEF PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(D)**

INTRODUCTION

In an effort to evade the Court’s supervision over the administration and resolution of this class action, Defendant and Defendant’s counsel have reached out directly to members of the proposed class and pressured them to accept small payments in exchange for broad releases of the claims raised in this action, along with confidentiality provisions that would prevent the Court or Plaintiff’s counsel from learning of those settlements. Plaintiff now seeks emergency relief to protect the interests of class members from being undermined by such communications. *See, e.g., Slamon v. Carrizo (Marcellus)*, No. 3:16-CV-2187, 2018 WL 3615989, at *3 (M.D. Pa. July 27, 2018); *Gates v. Rohm & Haas Co.*, No. CIV.A. 06-1743, 2006 WL 3420591, at *2 n.2 (E.D. Pa. Nov. 22, 2006) (“Defendants are prohibited from contacting and interviewing putative class members. Under Pennsylvania law, putative class members ‘are more properly characterized as parties to the action.’” (quoting *Bell v. Beneficial Consumer Disc. Co.*, 465 Pa. 225, 229 (1975))); *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665, 666 (E.D. Pa. 2001), *on reconsideration*,

No. CIV. A. 00-1966, 2001 WL 516635 (E.D. Pa. May 16, 2001); *Weller v. Dollar Gen. Corp.*, No. CV 17-2292, 2019 WL 1045960, at *2-*3 (E.D. Pa. Mar. 4, 2019) (same). Specifically, Plaintiff requests an order directing curative notice that, among other things, provides class members with contact information of Plaintiff’s counsel, orders discovery on these communications, provides the opportunity for rescission of any settlement agreements class members may have executed, and enjoins Defendant from further unsupervised, misleading communications with class members.

I. BACKGROUND

This proposed class action brings a breach of contract claim on behalf of former residents of Jenner’s Pond, a senior living community, who were charged a “market upgrade” fee in violation of the terms of their form agreements with Jenner’s Pond. The parties have engaged in discovery and recently entered into an agreed scheduling order which provides for the filing of a motion for class certification on March 31, 2021. Dkt. 42.

A. Defendant’s and Defendant’s counsel’s settlement communications with class members

On January 19, 2021, counsel for Plaintiff first learned that Defendant’s Director of Residential Services, Diane Singley, and Defendant’s counsel, Brian McCall, have been directly contacting class members in an effort to solicit settlement agreements that would release their claims in this action in exchange for minimal compensation and confidentiality. *See* Declaration of Natalie Lyons ¶¶ 2-23.

McCall and Singley have contacted several class members repeatedly by telephone and email. *Id.* ¶¶ 2, 13-14, 17.

Two class members have expressed concern to Plaintiff's counsel about the tactics employed by McCall and Singley. For example, one class member denies that an agreement was reached in a phone call with McCall and Singley but received a follow up letter from McCall that purports to memorialize an agreement reached on that call. Lyons Dec. ¶ 8. The letter enclosed a proposed settlement agreement. *Id.* ¶ 5; Ex. A. After that call, the class member received follow-up communications urging him to sign and return the proposed settlement agreement promptly. *Id.* ¶ 9.

Another class member was told that Defendant was making a "goodwill" offer. This member also felt pressured to agree to the offer and expressed suspicion about Defendants' overtures. *Id.* ¶¶ 19-21.

Neither McCall nor Singley provided these members with a copy of the Complaint in this action or contact information for Plaintiff's counsel. *Id.* ¶¶ 10, 15. McCall and Singley informed one member that they are engaging in similar communications with other members of the proposed class. *Id.* ¶ 17.

B. Defendant's proposed settlement agreement

Plaintiff's counsel has obtained a copy of the proposed settlement agreement ("Agreement") that Defendant and Defendant's counsel are transmitting to class members. Lyons Dec., Ex. A. While the proposed Agreement discloses the existence of this case, it does not provide a copy of the Complaint or the contact information for Plaintiff's counsel. The class members who reached Plaintiff's counsel had to conduct their own investigation to identify them, obtain their contact information and express their concerns to Plaintiff's counsel.

Defendant and Defendant's counsel have not provided these class members with the financial information relating to the resale value of the units, the amounts deducted for "market

upgrades,” or the damages sought under Plaintiff’s theory of this case. *See generally* Lyons Dec; Ex. A. Singley provided only a limited accounting to one member, and only after they requested it. *Id.* ¶ 18. Moreover, for a fraction of the damages amount claimed in this case, *id.* ¶ 12, Defendant seeks a complete release for the claims raised in this litigation, as well as a confidentiality provision that would prevent these class members from sharing this information with Plaintiff’s counsel, the Court or other class members. Ex. A ¶¶ 5, 8.

C. Communications between counsel for Plaintiff and Defendant

Upon learning of these communications with class members, Plaintiff’s counsel sent a letter to Jenner’s Pond seeking assurances from counsel for Defendant that (1) counsel and Defendant’s representatives would cease all communications with members of the proposed class, (2) counsel would immediately provide Plaintiff’s counsel with contact information for all individuals they have contacted, and (3) counsel would produce copies of all versions of settlement agreements that have been transmitted to members. Lyons Dec. ¶ 25; Ex. C. In response, Defendant’s counsel refused to provide any information, invited Plaintiff to file this motion¹ and unilaterally postponed the Rule 30(b)(6) deposition of its corporate representatives, just hours before it was scheduled to take place. *Id.* ¶¶ 26-29 Exs. D, E.

¹ The authority cited by counsel for Defendant evidences their cursory review. *See In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 287, 311-12 (3d Cir. 2005) (in case regarding ex parte contacts by attorneys representing members, not defense counsel, the court had authority to issue the order but it should have been more closely tailored to the “objectionable” language); *Walney v. Swepi LP*, No. CV 13-102 ERIE, 2017 WL 319801, at *9-*14 (W.D. Pa. Jan. 23, 2017) (permitting class counsel communications, not ex parte communications by defense counsel). For discussions of *Weller*, *Dondore* and *Slamon*, see *infra*.

II. ARGUMENT

A. The Court has ample authority under Rule 23(d) to protect the interests of putative class members

“Because of the potential for abuse, a district court has both the duty and the *broad authority* to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.” *Gulf Oil v. Bernard*, 452 U.S. 89, 100 (1981) (emphasis added). Rule 23(d) of the Federal Rules of Civil Procedure “specifically empowers district courts to issue orders to prevent abuse of the class action process. This power furthers the Federal Rules’ dual policy of protecting the interests of absent class members while fostering the fair and efficient resolution of numerous claims involving common issues.” *In re Sch. Asbestos Litig.*, 842 F.2d 671, 679–80 (3d Cir. 1988). Among other things, Rule 23(d) provides that “the court may issue orders . . . to protect class members and fairly conduct the action,” by requiring “appropriate notice to some or all class members of any step in the action,” “impos[ing] conditions on the representative parties or on intervenors,” and “deal[ing] with similar procedural matters.” *Id.* Adv. Comm. Notes (1966 Amendment) (noting, Rule 23(d) is “concerned with the fair and efficient conduct of the action”).

This authority includes prohibiting misleading communications to class members, which “pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally.” *In re Sch. Asbestos Litig.*, 842 F.2d at 680 (citing *Gulf Oil*, 452 U.S. at 101 n. 12). Misleading communications come in myriad forms. The Eleventh Circuit has made clear that “[u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation

of the facts, without opportunity for rebuttal.” *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1203 (11th Cir. 1985).

Thus, an order under Rule 23(d) may restrict “communications that seek or threaten to influence the choice of remedies,” consistent with the First Amendment. *In re Sch. Asbestos Litig.*, 842 F.2d at 683. *See also In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 310 (3d Cir. 2005) (courts required to “take steps to safeguard class members from unauthorized [and] misleading communications from the parties or their counsel” (internal citation omitted)).

Courts balance these competing interests through “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’ . . . [S]uch a clear and careful weighing ensures that such orders will ‘further[], rather than hinder[], the policies embodied in the Federal Rules.’” *In re Sch. Asbestos Litig.*, 842 F.2d at 680 (quoting *Gulf Oil*, 452 U.S. at 101).

Here, the available information provides sufficient findings for the Court to issue an order directing curative notice to correct Defendant’s one-sided, incomplete communications, ordering a Rule 30(b)(6) deposition of the Defendant on these communications, providing class members the opportunity to rescind agreements made on the basis of the communications, and enjoining Defendant from further misleading communications.

B. Defendant and Defendant’s counsel have engaged in unilateral, misleading and coercive communications in violation of class members’ protected interests

Both Counsel for Defendant and Defendant have engaged in coercive, misleading communications designed to promote Defendant’s interests in this litigation at the great expense of class members’ material interests. Thus, the Court is well-within its “broad” authority to step in and protect those otherwise unprotected individuals.

The “mere initiation” of this litigation “extend[ed] certain protections to potential class members, who have been characterized by the Supreme Court as ‘passive beneficiaries of the action brought in their behalf.’” *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001), *on reconsideration*, No. CIV. A. 00-1966, 2001 WL 516635 (E.D. Pa. May 16, 2001) (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552 (1974)). *See also Slamon v. Carrizo (Marcellus) LLC*, No. 3:16-CV-2187, 2018 WL 3615989, at *3 (M.D. Pa. July 27, 2018) (“The court’s duty to supervise communications with potential class members exists even before a class is certified.”). These interests are protected against *ex parte* “precertification statements [that] are factually inaccurate, unbalanced, [and] misleading.” *Katz v. DNC Servs. Corp.*, 275 F. Supp. 3d 579, 582 (E.D. Pa. 2017) (collecting cases) (internal quotations omitted). *See also Weller*, 2019 WL 1045960, at *2-*5 (same).

Here, Defendant and its counsel have pressured class members to settle their claims through one-sided communications that violate their protected interests in this litigation. First, Mr. McCall and Ms. Singley have employed coercive tactics in their phone conversations with putative members by, *inter alia*, failing to provide sufficient information to objectively evaluate the supposedly “goodwill” payout offer and contending that the disputed market upgrades were appropriate even though Defendant’s contracts do not provide for such upgrades. *See Lyons Dec.* ¶¶ 2-23. They further withheld essential factual information that is unfavorable to their position, including the basic accounting as to the amounts which had been withheld from those class members. *Id.* ¶ 18. Third, McCall and Singley failed to provide objective information to assist members in making an informed decision, like contact information for Plaintiff’s counsel or even a copy of the publicly filed complaint. *Id.* ¶¶ 10, 15. *See Cheverez v. Plains All Am. Pipeline, LP*, No. CV15-4113 PSG (JEMX), 2016 WL 861107, at *4 (C.D. Cal. Mar. 3, 2016) (misleading to

provide claim releases without providing a copy of the complaint or contact information for class counsel). Fourth, they have pressured members to agree to release their claims for meager consideration, in an agreement that prevents them from discussing their settlements with the Plaintiff, Plaintiff's counsel, or even this Court. *Id.* ¶¶ 7, 9, 12, 17-18, 20; Ex. A ¶ 8.

On a similar set of facts, the *Slamon* court exercised its “broad” authority under Rule 23(d) to protect class members where the defendant “sent a package of materials” to putative members, including a cover letter and an agreement to renegotiate the “valuation term in [putative members’] leases” while releasing “all potential claims against [the defendant] in exchange for a ‘signing bonus.’” 2018 WL 3615989, at *1. The court emphasized that it may “take action to cure the miscommunication . . . where potential class members have received inaccurate, confusing or misleading communications,” and further admonished that the policy against misleading communications to putative members “applies where a party misleads class members by omitting critical information from its communications.” *Id.* at *3 (citing, e.g., *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 252 (S.D.N.Y. 2005)). It then issued relief requiring correction of the misleading information, provision of class member information to the plaintiff’s counsel and an injunction forbidding misleading communications to members of the proposed class. *Id.* at *2-*5 (notably, the court did not need to address rescission of the settlement agreements, because the defendant agreed to do so).

Courts regularly exercise this “broad” authority under Rule 23(d) to protect members of a proposed class. *See, e.g., Weller*, 2019 WL 1045960, at *2-*5; *Katz v. DNC Servs. Corp.*, 275 F. Supp. 3d 579, 582-83 (E.D. Pa. 2017); *Dondore*, 152 F. Supp. 2d at 663-67; *Slamon*, 2018 WL 3615989, at *2-*6; *Cheverez*, 2016 WL 861107, at *3-*7; *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 441-42 (S.D. Tex. 1999); *Jones v. Casey’s Gen. Stores*, 517 F. Supp. 2d 1080,

1088–89 (S.D. Iowa 2007) (holding “one-sided, misleading communications” with putative members “could easily have the effect of tainting the entire putative class and jeopardizing this entire litigation”); *Maddox v. Knowledge Learning Corp.*, 499 F. Supp. 2d 1338, 1342–43 (N.D. Ga. 2007) (noting courts addressing this issue have “rel[ie]d upon their broad case management discretion to generally allow pre-notice communications while actively limiting misleading statements in such communications”) (collecting cases); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 252-54 (S.D.N.Y. 2005) (“[A] district court’s authority under Rule 23(d) is not limited to communications that actually mislead or otherwise threaten to create confusion, but extends to communications that . . . abuse the rights of [putative] members of the class.”) (collecting cases).

If Defendant is successful in its “[u]nsupervised, unilateral communications” with putative class members, “[t]he damage from misstatements could well be irreparable.” *Kleiner*, 751 F.2d at 1203. Namely, class members would release their claims without sufficient information and be barred from discussing the matter with others.

C. Defendant and Defendant’s counsel are further prohibited from contacting putative members under Pennsylvania law

As this Court has repeatedly held, putative class members have interests, as parties to the litigation under long-standing Pennsylvania law. *See, e.g., Gates v. Rohm & Haas Co., supra*, 2006 WL 3420591, at *2 n. 2; *Dondore*, 152 F. Supp. 2d at 666 (same); *Weller*, 2019 WL 1045960, at *2-*3 (same).

As the Supreme Court made clear in *Gulf Oil*, professional rules of ethics “properly impose restraints” on counsel’s expression in this context. 452 U.S. at 104 n. 21. While this case is in federal court, it alleges just one state-law claim; thus, “[Defendant] was bound by law governing Rule 23 class actions in Pennsylvania.” *Weller*, 2019 WL 1045960, at *2. And Defendant counsel’s

ability to communicate with class members is governed by Pennsylvania law. As the court in *Dondore* emphasized:

The ‘truly representative’ nature of a class action suit affords its putative members certain rights and protections including, we believe, the protections contained in Rule 4.2 of the Rules of Professional Conduct. . . . If defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined.

152 F. Supp. 2d at 666. (internal citations omitted).

CONCLUSION

For the foregoing reasons, Plaintiff seeks the Court’s expedited review and an order:

- (1) Enjoining counsel for Defendant, Defendant, and its employees, agents and representatives from further misleading communications with class members;
- (2) Requiring counsel for Defendant to provide Plaintiff’s counsel with contact information for all persons who have been contacted regarding settling the claims in this action;
- (3) Ordering Defendant to identify a corporate representative to be deposed on any and all matters related to Defendant’s communications with class members under Rule 30(b)(6) and within 14 days of the issuance of the Court’s Order; and
- (4) Directing curative notice, including providing class members the opportunity to rescind all settlement agreements executed by them which purport to release the claims in this action.

Dated: January 25, 2021

Respectfully submitted,

/s/ Richard Shevitz

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 25, 2021 a true and correct copy of Plaintiff's Motion for Emergency Relief Pursuant to Federal Rule of Civil Procedure 23(d) was served via electronic filing upon the following:

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Dated: January 25, 2021

By: /s/ Richard Shevitz
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