UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

IN RE: CAST IRON SOIL PIPE AND FITTINGS ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO: ALL DIRECT PURCHASER ACTIONS**	**No. 1:14-md-2508-HSM-WBC**

DIRECT PURCHASER PLAINTIFFS' MOTION FOR, AND MEMORANDUM OF LAW IN SUPPORT OF, AN ORDER DIRECTING COURT OVERSIGHT OF DEFENDANTS' COMMUNICATIONS WITH MEMBERS OF THE PROPOSED DIRECT PURCHASER CLASS

A. Introduction

"Rule 23(d) authorizes the court to regulate communications with potential class members, even before certification." MANUAL FOR COMPLEX LITIGATION (FOURTH), § 21.12 (2013) (the "MANUAL"). Direct Purchaser Plaintiffs ("DPPs"), through the undersigned Co-Lead Counsel and Liaison Counsel (collectively referred to here as "DPPs' Counsel," appointed by the Court on May 20, 2014, Dkt. No. 67, PageID #: 571-572) respectfully request that, consistent with its authority under Fed. R. Civ. P. 23(d), this Court oversee defendants' communications with members of the proposed direct purchaser class. Judicial oversight of defendants' communications with putative class members will ensure the protection of the rights of absent class members "and promote the just and efficient conduct of this litigation." JPML Transfer Order, filed on Feb. 18, 2014 in Master Docket No. 1:14-cv-2508-HSM-WBC, at PageID #: 26.

B. Relevant Facts

On May 14, 2014, the day before the Court's initial case management conference, DPPs' Counsel were informed that counsel for defendants Charlotte Pipe and Foundry Company and

Randolph Holding Company, LLC (collectively, "Charlotte Pipe") were contacting putative members of the proposed direct purchaser class. Specifically, DPPs' Counsel were furnished with a draft settlement agreement, a redacted version of which is attached here as Exhibit A,[1] between Charlotte Pipe and a customer believed to be a direct purchaser of cast iron soil pipes and fittings – and thus a member of the proposed direct purchaser class.

1. The Terms of the Draft Settlement Agreement Are Potentially Misleading

The draft settlement agreement: (1) contained only the barest description of the nature of this case, failing to even summarize (let alone specify) plaintiffs' allegations about defendants' price-fixing and other anti-competitive conduct; (2) neglected to specify that plaintiffs are seeking overcharge damages stemming from, *inter alia*, defendants' allegedly conspiratorial lockstep price increases for their CISP products during the class period; (3) failed to reference the fact that counsel for certain direct purchaser plaintiffs in the litigation were seeking appointment as lead counsel for the proposed class of direct purchasers, and otherwise failing to identify proposed class counsel; (4) omitted any description of how Charlotte Pipe's proposed settlement amount was calculated, giving no basis to gauge whether the amount offered would (or would not) represent a positive recovery in relation to whatever may be recovered had the customer stayed in the proposed direct purchaser class; (5) purported to release and discharge from liability not only Charlotte Pipe, but all of the McWane defendants (who are not even signatories to the agreement) for a broad array of conduct, "including but not limited to the conduct that is alleged or that could have been alleged and causes of action asserted or that could have been asserted" in this case, *see* Ex. A, at page 2,

[1] The customer name and the proposed settlement amount have been redacted from Exhibit A. DPPs' Counsel will provide the Court with an un-redacted version of Exhibit A for the Court's *in camera* inspection, if the Court so desires.

Items 1(a) and 3; and (6) forced the signatory to opt out of any settlement or litigation class that the Court may eventually certify, *see* Ex. A, page 2, Item 4.

2. Defendants Reject DPPs' Counsel's Requests for Defendants' Communications with Putative Class Members

At the initial case management conference on May 15, 2014, DPPs' Counsel informed the Court that counsel had been advised that defendant Charlotte Pipe was contacting putative class members in an effort to settle the claims at issue in this case, and to encourage them to opt out of this litigation. The Court directed the parties to confer on the issue. On May 19, 2014, DPPs' Counsel wrote to counsel for the Charlotte Pipe defendants expressing DPPs' Counsel's significant concerns regarding Charlotte Pipe's communications with putative class members, and requesting that Charlotte Pipe furnish DPPs' Counsel "with all communications, including statements made about this litigation and any written materials, that Charlotte Pipe (or any of its subsidiaries, whether or not named as defendants in this litigation) or anyone acting on its behalf have sent to, or received from, putative members of the direct purchaser class (including any agreements) in connection with this lawsuit." Ex. B (May 19, 2014 Letter from DPP Counsel Robert N. Kaplan to Roger W. Dickson, Mark W. Merritt and Timothy L. O'Mara, counsel for the Charlotte Pipe defendants, at 2).[2]

The May 19, 2014 letter further requested that defense counsel contact DPPs' Counsel to set up a date and time to confer on the issue pursuant to the Court's direction. The parties conferred via telephone on May 23, 2014. On that call, defense counsel stated that they would neither furnish DPPs' Counsel with the requested information, nor curtail their communications with putative

[2] The May 19, 2014 letter copied counsel for the McWane defendants, and asked that "such documents and information be provided by McWane and its counsel to the extent they have them." Ex. B, at 2.

members of the direct purchaser class. Because the parties are at an impasse, and further negotiations are unlikely to succeed, DPPs have been forced to seek the Court's oversight of defendants' communications with putative members of the direct purchaser class. DPPs respectfully contend that such oversight is necessary in this instance in order to protect the putative class members.

C. Argument

1. This Court's Rule 23 Authority to Supervise Defendants' Communications with Members of the Proposed Direct Purchaser Class

Communications that threaten the choice of remedies available to class members are subject to this Court's supervision under Rule 23(d). *See In re Sch. Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988) ("A district court's duty and authority under Rule 23(d) to protect the integrity of the class and the administration of justice generally is not limited only to those communications that mislead or otherwise threaten to create confusion and to influence the threshold decision whether to remain in the class. Certainly communications that seek or threaten to influence the choice of remedies are . . . within a district court's discretion to regulate.") That is the case here. Defendants' efforts to have putative class members opt out of any certified class – regardless of whether such a class is certified for litigation or settlement purposes, *see* Ex. A, at page 2, Item 4 – counsels in favor of some measure of judicial oversight. *See Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630, 632 (N.D. Tex. 1994) (noting that defendant's communications affecting a class member's decision to participate in the litigation are improper).

Before a class is certified, "[d]efendants and their counsel may communicate with potential class members in the ordinary course of business, including discussing settlement before certification, but may not give false, misleading, or intimidating information, conceal material information, or attempt to influence about whether to request exclusion from a class

. ..” MANUAL, at § 21.12. In an opinion affirming a magistrate judge’s order limiting defendants’ pre-certification communications with potential class members in *In re Southeastern Milk Antitrust Litig.*, 2009 U.S. Dist. LEXIS 102635, at * 17 - *18 (E.D. Tenn. Nov. 3, 2009), Judge Greer explored the precepts and authorities in this area:

> [T]he Court’s authority to limit communication is quite clearly established by the weight of applicable authority, subject only to restrictions mandated by the First Amendment. *See Gulf Oil v. Bernard*, 452 U.S. 89, 100, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981) (affirming District Court’s authority to limit communications between counsel and putative class members, subject to restrictions mandated by First Amendment); *In re School Asbestos Litigation*, 842 F.2d 671, 680 (3d Cir. 1988). Because class actions present opportunities for abuse, *Gulf Oil Co.*, 452 U.S. at 100, “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.” *Id.*

A court should take steps to further the policies embodied in Rule 23, and one of Rule 23’s policies is the protection of class members from “misleading communications from the parties or their counsel.” *Erhardt v. Prudential Grp.*, 629 F.2d 843, 846 (2d Cir. 1980). That policy applies where – as here – a party may be misleading putative class members by omitting “material information” from its communications. *See* MANUAL, at § 21.12.

2. Defendants’ Communications with Putative Class Members Lack Crucial Information

As detailed above, the draft settlement agreement received by DPPs’ Counsel gives no indication that defendants are providing putative class members with critical information about class counsel, the precise nature of plaintiffs’ allegations or the extent of likely damages. That is the kind of possibly incomplete or inaccurate information that is subject to this Court’s oversight under Rule 23. *See* MANUAL, at § 21.12 (“If class members have received inaccurate precertification communications, the judge can take action to cure the miscommunication and to prevent similar problems in the future. . . . Misrepresentations or other misconduct in

communicating with the class . . . may be prohibited or penalized under the court's Rule 23(d)(2) plenary protective authority.").

The draft settlement agreement indicates that, at best, putative class members are being given a biased picture of the action – which is the kind of potentially misleading communication that courts have long subjected to oversight. *See Erhardt*, 629 F.2d at 846 ("It is the responsibility of the court . . . to safeguard [the class] from unauthorized misleading communications . . . Unapproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality, or contain untruths will surely result in confusion and adversely affect the administration of justice."); *Kleiner v. First Nat'l. Bank of Atlanta,* 751 F.2d 1193, 1203 (11th Cir. 1985) ("Unsupervised, unilateral communications [by a defendant] 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.").

3. Defendants' Communications with Putative Class Members May Interfere with the Proper Administration of this Litigation

This Court's Rule 23(d) authority is not limited to communications that actually mislead or otherwise threaten to create confusion, but extends to communications that interfere with the proper administration of a class action or those that abuse the rights of members of the class. *See, e.g., Se. Milk*, 2009 U.S. Dist. LEXIS 102635, at *19 ("Several forms of abuse . . . have been considered sufficient to warrant limitations on communications between litigants and putative class members. These 'include communications that coerce prospective class members into excluding themselves from the litigation; communication[s] that contain false, misleading or confusing statements; and communications that undermine cooperation with or confidence in class counsel.'" (internal citation omitted)).

This is particularly true where, as here, defendants have ongoing business relationships with absent class members and are unilaterally communicating with them about the litigation. "A unilateral communications scheme, moreover, is rife with potential for coercion. If the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive." *Kleiner*, 751 F.2d at 1202 (internal quotation marks, citations and brackets omitted). DPPs requested that defendants produce materials reflecting communications with putative class members about this litigation. Defendants have refused to produce those materials. DPPs' respectfully request that the Court require defendants to produce the materials requested in DPPs' May 19, 2014 letter. *See* MANUAL, at § 21.12 ("If defendants are in an ongoing business relationship with members of the putative class, the court might consider requiring production of communications relating to the case.")

4. Judicial Oversight of Defendants' Communications with Putative Class Members is Appropriate in Light of Defendants' Settlement Offers

Finally, supervision of, or limitation on, defendants' communications with putative class members is appropriate in the context of settlement offers, particularly when it is unclear "whether or not the putative class members have, or can obtain, sufficient information to fairly evaluate the settlement offer." *Southeastern Milk*, 2009 U.S. Dist. LEXIS 102635, at *20. Discovery has not yet started, and DPPs cannot specifically quantify damages at this stage. Yet even based on typical recoveries in price-fixing class action cases (often a portion of estimated overcharges in the range of 4-20 percent of gross sales), DPPs believe that Charlotte Pipe is trying to settle these claims for itself (and for the McWane defendants) for a miniscule percentage of a given customer's potential recovery in this case. It is unclear if defendants' communications with members of the proposed direct purchaser class are providing sufficient information for those class members to make informed choices; the draft settlement gives no indication that that is the case.

5. DPPs' Requested Relief

DPPs respectfully request that the Court enter an order that requires defendants to: (1) produce the materials requested in DPPs' May 19, 2014 letter; (2) furnish the Court and DPPs' Counsel with drafts of any future communications with members of the proposed direct purchaser class, so that such communications can be reviewed by both the Court and DPPs' Counsel prior to dissemination and approval by the Court; (3) include contact information for DPPs' Counsel in any future communications; (4) provide DPPs' Counsel with the names and contact information of all putative members of the direct purchaser class that are in the defendants' possession, so that DPPs' Counsel are in a position to communicate with those putative class members; and (5) maintain detailed lists of all the putative class members contacted by defendants prior to class certification, and produce those lists to the Court and DPPs' Counsel.[3]

D. Conclusion

In light of defendant Charlotte Pipe's known contacts with putative class members, at this early stage of the litigation, judicial oversight is necessary to adequately protect the interests of those entities. For all the foregoing reasons, DPPs respectfully request that the Court grant the requested relief regarding supervision of defendants' communications with putative class members. DPPs also ask that the Court order defendants to produce the materials requested in DPPs' Counsel's May 19, 2014 letter to defense counsel.

Dated: June 2, 2014

[3] Courts have entered similar orders before without running afoul of defendants' rights under the First Amendment. *See, e.g.*, *A&R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 125596, at *10 -11 (D. Conn. Sept. 5, 2012).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 2 June 2014, a true and correct copy of the foregoing has been served electronically. Notice of this filing will be sent by operation of the Court's CM/ECF system to all parties shown on the electronic filing receipt.

/s/ Scott N. Brown, Jr.
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