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

KING DRUG COMPANY OF FLORENCE, INC., on behalf of itself and all others similarly situated, **Plaintiffs,** **v.** **CEPHALON, INC., ET AL.,** **Defendants.**	**Civil Action No. 06-cv-1797-MSG** **Judge Mitchell S. Goldberg**

MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION TO RESTRICT COMMUNICATIONS BETWEEN THE TEVA DEFENDANTS AND ABSENT CLASS MEMBERS

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The *King Drug* Direct Purchaser Class Plaintiffs respectfully submit this memorandum of law in support of their Emergency Motion to Restrict and Supervise Communications Between the Teva Defendants[1] and Absent Class Members. With the class certification hearing in this case (and trial in the FTC action) looming, the Teva Defendants are attempting to limit their substantial liability exposure by wrestling settlements on the cheap from individual class members. In pursuing this strategy, the Teva Defendants have even warned about potential "negative" consequences of litigation. The class members here are distributors and depend on Teva – the largest generic manufacturer in the world – for their livelihood. It is precisely to prevent such coercion – and misleading comments – that this Court has a legally mandated role under Fed. R. Civ. P. 23 to oversee this class action.

The Court should not countenance the Teva Defendants' desperate ploy. The circumvention of Class Counsel is particularly egregious here because the claims that the Teva Defendants are secretly trying to settle exist solely because of the filing and maintenance of this class action by Class Counsel. If not for this class case, these claims would face defense arguments that the statute of limitations period had run. The Teva Defendants should be ordered to cease their efforts and to disclose the substance of any communications which they have made, and a corrective notice should be provided to the class.

I. INTRODUCTION

On August 18, 2009, this Court entered an order appointing interim counsel for the class under Fed. R. Civ. P. 23(g) ("Class Counsel"). *See* Dkt. No. 196. The order was entered without

[1] The "Teva Defendants" include Cephalon, Inc., ("Cephalon"), Barr Pharmaceuticals, Inc. (formerly known as Barr Laboratories, Inc.) ("Barr"), Teva Pharmaceutical Industries, Ltd. and Teva Pharmaceuticals USA, Inc. ("Teva"). As the Court is already aware, Teva has acquired both Cephalon and Barr. Plaintiffs are not aware of similar conduct by Teva's co-defendants, but the same restrictions on communications with class members should apply to all defendants.

any opposition from the Teva Defendants. In that order, this Court specifically charged Class Counsel with authority over "the timing and substance of any settlement negotiations with Defendants" and the "presentation of any proposed settlements to the Court[.]" *Id.* ¶ 2.

Despite that order, on March 2, 2015, Class Counsel learned that the Teva Defendants had contacted a class member to settle the case on the cheap – without the knowledge of the Court or Class Counsel. Teva had one of its executives telephone a non-lawyer absent member (and likely, more were contacted as well) and urge the class member to settle their claims in exchange for cash payments worth a fraction of their value. *See* Affidavit of Susan Segura, Exh. A to the Declaration of Daniel C. Simons ("Simons Decl.").[2] Among other things, the Teva executive:

- mentioned the negativity of continued litigation, which is unduly coercive because it implicitly threatens to put the company's business relationship with Teva in jeopardy absent acceptance of Teva's offer;
- failed to advise the class member of Teva's total potential liability in the case, and the full value of the class member's claim;
- failed to advise that a class certification hearing is imminent;
- failed to advise that the amount of any settlement reached is subject to being reduced to pay for fees and costs incurred by Class Counsel;[3]

[2] Plaintiffs are withholding the identity of the whistleblower class member out of concern of retaliation from defendants. Indeed, one of the concerns about the communication, from a dominant supplier of many generic (and some branded) drugs to a smaller company, is that it is inherently coercive. If the Court directs, Plaintiffs would reveal the class member's identity *in camera*.

[3] *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 659 (E.D. Pa. 2003) (class counsel entitled to share of any funds recovered by those who opted out of class and brought individual actions).

- failed to advise that any settlement would likely be not with Teva alone, but would also likely release claims against Cephalon and Barr as well;
- failed to advise that defense motions for summary judgment had been denied;
- failed to advise that the trial in the FTC action was imminent and that the FTC action would proceed regardless of whether the class member settled;
- failed to advise that the FTC has already committed to the direct purchaser class that it may recover from any funds won by the FTC as to Cephalon's liability; and
- failed to provide the class member with a copy of the complaint or contact information for Class Counsel.

Upon learning of Teva's misleading and coercive communications, Class Counsel immediately demanded that counsel for the Teva Defendants halt the improper campaign, and requested information concerning all communications between the Teva Defendants and absent members relating to the Teva Defendants' efforts to secretly settle individual claims. Simons Decl. Exh. B, Letter from B. Gerstein to Counsel for Teva Defendants (Mar. 2, 2015).

On March 3, 2015, counsel for Teva responded. *See* Simons Decl. Exh. C, Email from Joe Wolfson to Joseph Opper (Mar. 3, 2015). In that response, Teva (a) did not deny that such a communication had occurred; and (b) while denying the participation of outside counsel, did not deny the actual or possible participation by in-house Teva counsel or Teva personnel. Indeed, it is hard to believe that some counsel for Teva was not involved as a specific dollar amount was offered to the absent Class member along with a request for a formal release – which would not be the actions of a rogue employee.

Plaintiffs now move the Court, on an emergency basis, for an order:

(a) requiring the Teva Defendants to identify which employees or agents of the Teva Defendants have made contact with absent class members; which absent class members were contacted and the names and contact information for those approached; the dates, times, and substance of any such oral communications; and copies of any written communications with absent members of the proposed class regarding this litigation;

(b) directing that the Defendants may not communicate with absent class members about this case;

(c) issuing a curative notice from the Court;

(d) holding that any release that may have been signed by a member of the proposed class is null and void; and

(e) providing any other relief the Court believes is just and equitable.

Unless the Court takes immediate action to rectify the attempted subversion of the class process, class members may be deprived of their due under the law, undermining the very purpose of the class action device.

The risk here is great that class members may be coercively and misleadingly led to give up their rights. Teva bills itself as "the leading generic pharmaceutical manufacturer in the world," and boasts that "[o]ne in seven of the 3.4 billion generic prescriptions written in the United States is filled with a Teva product." Simons Decl., Exh. D (www.tevausa.com excerpt). The class members here – distributors of prescription pharmaceuticals – heavily depend on their relationship with manufacturers like Teva in order to fill their warehouses and meet customer demand. Any direct or veiled threat of "negative" consequences in that relationship places

undue pressure on class members to placate the largest generic supplier in the U.S. market. Indeed, that is one of the reasons class certification is warranted here.[4]

The Teva Defendants control branded products in addition to their large generic portfolio. Indeed, the gravamen of the instant lawsuit is that Cephalon (now owned by Teva) preserved its status as the sole supplier of Provigil illegally. While generic modafinil is finally (and belatedly) available, the period of delay enabled Cephalon to switch prescriptions to its new branded product, Nuvigil. Cephalon remains the only company with FDA approval to market Nuvigil in the United States.[5] Teva also retains exclusivity on the blockbuster multiple sclerosis drug Copaxone. As the sole source for these and other branded medicines, the Teva Defendants can apply inordinate pressure upon a drug wholesaler.

A class certification hearing in this matter is scheduled for March 26, 2014. Dkt. No. 743. Faced with the likely and imminent prospect of certification of the class,[6] as well as the prospect of a trial in which the RE '516 patent is deemed invalid, the Teva Defendants have disclosed a lack of confidence in their own legal positions and have attempted to secretly settle this case with at least one absent class member without notifying Class Counsel or the Court.

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[4] Defendants scoffed at the suggestion that class members might be reluctant to sue individually for fear of retaliation. *See* Defendants' Memorandum in Opposition to *King Drug* Direct Purchaser Class Plaintiffs' Motion for Class Certification, June 19, 2014, Dkt. No. 704 at 16. Yet the Teva Defendants are now trying to leverage precisely that fear.

[5] http://www.accessdata.fda.gov/scripts/cder/ob/docs/tempai.cfm

[6] As Plaintiffs noted in their class certification brief, many courts have previously held that certification is warranted for similar antitrust lawsuits brought by direct purchasers of brand-name drugs challenging the delay of generic competition. *See King Drug* Direct Purchaser Class Plaintiffs' Memorandum of Law in Support of Their Motion for Certification, Dkt. No. 662, at 1 n.1.

The strategy and conduct of the Teva Defendants, in attempting to directly communicate with absent class members and negotiate settlements on the basis of incomplete and misleading information, must be stopped and corrected. And they apparently know such conduct is improper – they made the tactical decision to hide their actions from the Court and Court-appointed interim Class Counsel by having a non-lawyer contact the absent class member. Plaintiffs request the Court's intervention to stop this conduct and ameliorate the harm already caused.

II. ARGUMENT

A. Defense Counsel's Contacts With Absent Class Members Are Improper

1. Defense Counsel Has Attempted to Avoid Judicial Scrutiny and Disregarded the Purpose of Rule 23

Courts have long been suspicious of defendants' unsupervised communications with potential class members. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), for example, the Supreme Court recognized the potential for abuse inherent in communications with absent members of the class, and found Rule 23(d) authorized "an order limiting communications between parties and potential class members[.]"[7] *Id.* at 101. The district court's power to regulate communications "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 School Asbestos Litig.*, 842 F.2d 671, 680 (3d Cir. 1988).

[7] *Gulf Oil* held that blanket restrictions on communications with potential class members, absent findings of potential abuse, were invalid. Prior to *Gulf Oil*, blanket no-contact orders prohibiting any type of pre-certification contacts were common as a prophylactic measure. *See* 5 Newberg on Class Actions § 15:7 (4th ed.) (2003) (discussing history of restrictions on attorney contact with putative class members).

Courts possess such authority even prior to certification of the class. *See Ojeda-Sanchez v. Bland Farms*, 600 F. Supp. 2d 1373, 1381 (S.D. Ga. 2009); *Dondore v. NGK Metals Corp*., 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) ("The mere initiation of a class action extends certain protections to potential class members, who have been characterized by the Supreme Court as 'passive beneficiaries of the action brought in their behalf.'") (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551-52 (1974)); *Rankin v. Board of Educ. Wichita Public Schools*, 174 F.R.D. 695, 697 (D. Kan. 1997) (barring defense communication with class members following pre-certification attempts to pick off class members). *See also Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 667 (E.D. Tex. 2003) (court has authority to restrict defense communications with potential class members who have not yet opted into FLSA action). And here, the District Court has appointed interim Class Counsel and charged them with negotiating any settlement between defendants and the Class.

Misleading or coercive communications "pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally." *School Asbestos Litig*., 842 F.2d at 680. Accordingly, "[f]ederal courts have routinely exercised their discretion to restrict communications in class actions… where a party has engaged in misleading or coercive behavior with respect to prospective class members." *Longcrier v. HL-A Co*., 595 F. Supp. 2d 1218, 1227 (S.D. Ala. 2008). *See also In re Community Bank of N. Virginia*, 418 F.3d 277, 311 (3d Cir. 2005) ("Misleading communications by soliciting counsel have a detrimental effect on the class notice procedure and, therefore, on the fair administration of justice."). Indeed, a district court's authority extends to communications that "threaten to create confusion and to influence the threshold decision whether to remain in the class." *School Asbestos Litig*., 842 F.2d at 683

An order restricting communications is warranted upon a showing of "a likelihood of serious abuses"; actual harm need not be proven. *See Hampton Hardware, Inc. v. Cotter & Co., Inc*., 156 F.R.D. 630, 633 (N.D. Tex. 1994). Such an order must be "based on a clear record and specific findings" that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. *School Asbestos Litig*., 842 F.2d at 680.

Courts have recognized that a "unilateral communications scheme" – such as the one the Teva Defendants engaged in here -- "is rife with potential for coercion." *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985). Indeed, since *Gulf Oil*, "the trend is to require some form of court supervision of all communications between defendants and potential class members." 1 Bus. & Comm. Lit. in Fed. Courts § 15.21(b) (Robert L. Haig ed.) (West 1998).

"[A] solicitations scheme relegates the essential supervision of the court to the status of an afterthought." *Kleiner*, 751 F.2d at 1203. "The solicitations of exclusions from a pending class action by a defendant before the court has determined that the case may proceed as a class action constitutes a serious challenge to the authority of the court to have some control over communications with class members." 5 Newberg on Class Actions § 15:19 (4th ed.). Here, Defendants have improperly attempted to seize upon the pendency of a class certification order to usurp the Court's oversight function.

Thus, restrictions on communications with absent class members – such as an order precluding a defendant from soliciting class members not to participate in the litigation – may be justified. *Kleiner*, 751 F.2d at 1205-07.

Where courts have acted to restrict communications, they have done so to safeguard against the following risks, for example:

a. Coercive Communications

It is the Court's responsibility to protect the right of absent class members to make a free and informed decision on whether to participate in the litigation. *Kleiner*, 751 F.2d at 1202. Courts have recognized that the danger of coercion is especially great where the parties are engaged in an ongoing business relationship. *See Kleiner*, 751 F.2d at 1202 (bank customers and bank); *Ralph Oldsmobile, Inc. v. General Motors Corp.*, No. 99* Civ. 4567, 2001 WL 1035132, at *5 (S.D.N.Y. Sept. 7, 2001) (automobile dealerships and auto company); *Hampton Hardware*, 156 F.R.D. at 630 (stores and supplier of merchandise).[8]

"The fact that the defendant and potential class members are involved in an on-going business relationship, further underscores the potential for coercion." *Hampton Hardware*, 156 F.R.D. at 633 (citation omitted). "Business customers or purchasers have a reluctance to [participate in the class] for fear that they are biting the hand that feeds them or supplies them with needed goods or materials." 3 Newberg on Class Actions § 8.42 (4th ed.). Thus, a defendant may be enjoined from communicating with class members where the purpose of the communication is to encourage exclusion from the suit (the likely consequence of a separate settlement) or to discourage the filing of proofs of claim. As Professor Newberg remarked,

[8] Cf. *Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 678 (N.D. Ga.1999) (noting that, even though Coca-Cola had not given the court any reason to suspect that it will attempt to mislead its employees and coerce them, "simple reality suggests that the danger of coercion is real" and justifies imposition of limitations on Coca-Cola's communications with potential class members); *Recinos-Recinos v. Express Forestry, Inc.*, 2006 WL 197030, at *12 (E.D. La. Jan. 24, 2006) ("the court recognizes that an ongoing business relationship between the defendants and the plaintiffs and potential plaintiffs may cause communications to be coercive. Where, as here, there is a relationship that is inherently coercive, the court need not make a finding that a particular abuse occurred.") (employees and employer); *Mevorah v. Wells Fargo Home Mort., Inc.*, 2005 WL 4813523, at *4 (N.D. Cal. Nov. 17, 2005) ("reasonable to assume that an employee would feel a strong obligation to cooperate with his or her employer in defending against a lawsuit.").

"[t]he possibility of such improper communications is more likely when there is a close commercial relationship between class members and the defendant company because of the implicit threat of economic sanctions or retaliation on the part of a supplier of scarce or unique goods . . ." Newberg at § 8.42.

Here, Teva specifically alluded to "negative" role of continued litigation in its communication with an absent Class member. This statement is reasonably interpreted as a threat of potential "negative" ramifications to the relationship with Teva should there be no settlement. The statement is particularly troubling given that Teva is the "leading" supplier of hundreds (if not thousands) of generic products, and the only source of certain branded products, including the follow-on product to Provigil (Nuvigil). Without access to the full suite of the Teva Defendants' products, the absent class members could lose business. Teva's secret campaign apparently is designed to exploit precisely that fear. The fact that the communication here was made orally, rather than in writing, only heightens the concern for harm and abuse, because of the difficulty in monitoring such communications, even after the fact. *See Kleiner*, 751 F.2d at 1206 ('The Supreme Court has acknowledged that unsupervised oral solicitations, by their very nature, are wont to produce distorted statements on the one hand and the coercion of susceptible individuals on the other…").

Given the Court's order appointing interim Class Counsel, the entire proposed class is in some important sense represented by Class Counsel, at least with regard to settlement of the claims at issue in this case.[9] Class Counsel have been charged with the responsibility to protect

[9] A "constructive attorney-client relationship" exists between class counsel and potential class members. 5 Newberg on Class Actions § 15:14 (4th ed.); *see Kleiner*, 751 F.2d at 1207 n.28. The Supreme Court has observed that a class action is "a truly representative suit" and that "class action representation" belongs to all parties, even "asserted class members who were unaware of

the interests of the members of the proposed class regarding their rights in this litigation. The Teva Defendants, by contrast, have interests directly opposed to absent class members. Tellingly, Teva's employee did ***not*** fully disclose that his interests (and those of his employer) are directly adverse to those of the absent Class member he contacted. The abuse is especially apparent here, where the employee of a dominant supplier contacts the targets of the secret campaign.

b. Misinformation

Communications containing false or misleading statements also warrant an order restricting communication. "In view of the tension between the preference for class adjudication and the individual autonomy afforded by exclusion, it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action." *Kleiner*, 751 F.2d at 1202. Courts carefully scrutinize communications alleged to be false or misleading, and are clearly authorized to remedy any misinformation disseminated to potential class members. *See Gulf Oil*, 452 U.S. at 101.

Here, the communication by the Teva Defendants included several misrepresentations or material omissions. The Teva Defendants:

- failed to advise the class member of Teva's total potential liability in the case, and the full value of the class member's claim;
- failed to advise that a class certification hearing is imminent;

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the proceedings brought in their interest." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551-52 (1974).

- failed to advise that the amount of any settlement reached is subject to being reduced to pay for fees and costs incurred by Class Counsel;[10]
- failed to advise that any settlement would likely be not with Teva alone, but would also likely release claims against Cephalon and Barr as well since Teva has acquired both Cephalon and Barr;
- failed to advise that defense motions for summary judgment have been denied;
- failed to advise that the trial in the FTC action was imminent and that the FTC action would proceed regardless of whether the class member settled;
- failed to advise that the FTC has already committed to the direct purchaser class that it may recover from any funds won by the FTC as regards Cephalon's liability;[11] and
- failed to provide the class member with a copy of the complaint or contact information for Class Counsel.

[10] Notably, the Teva Defendants make it appear as if the absent class member will be able to keep the entirety of the proffered settlement amount. But even if a class member settles separately, the class member's recovery is subject to reduction for Class Counsel's fees and proportionate expenses in order to avoid unjust enrichment. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 659 (E.D. Pa. 2003) (class counsel entitled to share of any funds recovered by those who opted out of class and brought individual actions). Because the Teva Defendants' communications misleadingly portray their offer as the entirety of what the class member may keep, the communications are misleading. *See Belt*, 299 F. Supp. 2d at 668 (communication deemed misleading when it "mischaracterized the damages available to the putative class" and made incorrect statements about whether attorneys' fees need be deducted).

[11] *See* Plaintiff Federal Trade Commission's Memorandum in Opposition to Cephalon's Motion to Preclude the FTC's Disgorgement Claim, FTC Action, 08-2141, Dkt. No. 352 at 31 ("The FTC's proposed disgorgement remedy would put any award into a Consumer Relief Fund… Until extinguished, this fund could be used to resolve any existing Provigil antitrust claim in the co-pending cases.") (footnote omitted).

Finally, as discussed above, the Teva Defendants misleadingly made it appear as though they and the absent class member shared common interests, obscuring the fundamental conflict between them.

c. Defendants' Unsupervised Communications with Absent Class Members Undermine the Purpose of Fed. R. Civ. P. 23

The Teva Defendants' attempt to wrest settlements from absent class members also undermine the purposes of Rule 23. They seek to have absent class members surrender the benefits of this class action. This conduct is all the more improper given that the Teva Defendants are engaging in it immediately prior to the certification hearing to undermine the class.

Courts often restrict contacts with proposed class members where the contacts "[seek] either to affect class members' decisions to participate in the litigation or to undermine class plaintiffs' cooperation with or confidence in class counsel." *In re School Asbestos Litig.*, 842 F.2d at 682. Such contacts undermine the purpose and efficacy of the class action device. "'Rule 23 expresses a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single action.'" *Hampton Hardware*, 156 F.R.D. at 633 (*quoting Gulf Oil*, 452 U.S. at 99 n.11). Indeed, it has been recognized that, as here, a defendants' contacts with class members may sabotage the policies behind Rule 23 "by attempting to reduce the class members' participation in the lawsuit . . ." *Hampton Hardware*, 156 F.R.D. at 633. *See also Ojeda-Sanchez*, 600 F. Supp. 2d at 1381 (entering order barring communication where class members "felt that they were placed in a situation where they were required to distance themselves from the litigation" and defendant's

contacts "threatened both the relationship that plaintiffs had with their counsel and their participation in this litigation").

Courts recognize the particular hazard where a defendant attempts to interfere with absentees' participation in the class action. Courts therefore are watchful of efforts by "defendants [] to directly lobby the prospective members of the class action concerning their possible participation in the class action, should it be certified. There is no legitimate purpose for defendants to communicate with prospective members of the class concerning the lawsuit; such communications could invite abuse." *See Rankin*, 174 F.R.D. at 697 (citation omitted).

Defense communications with class members may present a biased picture of the action. "Unsupervised, 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*, 751 F.2d at 1203. *See also School Asbestos*, 842 F.2d at 682-83 (fact that otherwise non-misleading communications are not "litigation-neutral" affects propriety of those communications).

Here, the Teva Defendants attempted to get at least one absent class member to part with its claims with misstatements, material omissions, and a direct or veiled threat. As such, the Teva Defendants have clearly attempted to undermine the Rule 23 proceeding now before this Court, and chose a tactic that would conceal these communications from both the Court and Class Counsel.

Indeed, but for the revelation of the whistleblower absent class member, Plaintiffs, Class Counsel and the Court would likely have been ignorant of the Teva Defendants' efforts to undermine the class proceeding. And, all of this is occurring while this Court is preparing for the upcoming class certification hearing, and a long-awaited trial approaches.

Accordingly, in the interest of preserving the integrity of Rule 23, this Court should preclude any communications by Defendants and their lawyers with absent members of the proposed Class.

B. Proposed Remedy

This Court has a duty to protect the absent Class members and to ensure the honesty, accuracy, and appropriateness of communications between Defendants – or their counsel – and members of the proposed Class. Likewise, Class Counsel have a fiduciary duty to potential Class members. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000). However, it is impossible for either the Court or Class Counsel to carry out their duties when the defendants conduct a campaign in secret. Accordingly, under the broad supervisory authority granted by Rule 23(d), the Court should enter appropriate orders to restrict Defendants' communications with members of the Class. *See, e.g.*, *Kleiner*, 751 F.2d at 1203 (district court has a "duty to 'protect both the absent class and the integrity of the judicial process by monitoring the actions before it.'") (quoting *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980)).

In response to the Teva Defendants' improper communications to date, Plaintiffs request a Court order granting the following relief:

(a) requiring the Teva Defendants to identify which individuals have made contact with absent class members; which absent class members were contacted and the names and contact information for those approached; the dates, times, and substance of any such oral communications; and copies of any written

communications with absent members of the proposed Class regarding this litigation;

(b) directing that the Defendants may not communicate with absent Class members about this case;

(c) allowing or issuing a curative notice specifically advising absent class members of the pendency of the class action and the class certification motion, providing them with a copy of the Second Amended Class Action Complaint, and informing class members of the denial of summary judgment and the impending trial in the FTC action;

(d) holding that any release signed by a member of the proposed class relating to this case be declared null and void; and

(e) any other relief the Court deems just and appropriate.

Once the extent and substance of the communications are revealed to Plaintiffs and the Court, further remedial action may be necessary. However, given the paucity of information at this stage (brought about entirely by the Teva Defendants' deliberate secrecy), the above-listed remedies are the least restrictive means justified on the available evidence. The fact that an absent Class member felt compelled to advise Class Counsel of the Teva Defendants' conduct suggests that the Teva Defendants' behavior has caused concern and confusion among the absent class members. In an effort to balance the various concerns, Plaintiffs' proposed remedies are narrowly tailored to protect the interests of the parties involved.

1. Requests for Relief (a) and (b) – Disclosure of Class Member Communications.

Disclosure of any communications with potential Class members is a common form of relief. *See, e.g.*, *School Asbestos*, 842 F.2d at 683 (disclosure requirement appropriate for defendants' direct communications with class members, although district court's order requiring disclosure of *any* communications was overly broad). *Cf. In re Potash Antitrust Litig.*, 896 F. Supp. 916, 921 (D. Minn. 1995) (where defendant sent non-misleading notice to class members after official class notice was sent, court held that defendants must give copies of past and future communications with class members to the court and to class counsel). By requiring the Teva Defendants to detail any communications made with absent class members (including any settlement offers made or any releases already obtained) and stopping further communication will ensure that class members are not subjected to unfair pressure or deception.

Given the inherent risks involved in allowing one-sided contacts, plus the Teva Defendants' coercive behavior towards its customers, a requirement of prior, express Court approval of any future communications relating to this case is justified.

As discussed, Plaintiffs' case is premised upon the theory that the Teva Defendants illegally obtained and maintained monopoly power, and abused that power to maintain and hike prices far beyond competitive levels. Given Defendants' abuse of their market power combined with their current attempt to use the procedural posture of this case to allow their abuse to remain unremedied, the Court should require Defendants and any and all of their agents to obtain the Court's approval prior to making any contacts with absent class members about this case.

2. Requests For Relief (c) and (d) – Refusing To Recognize Any Release Signed By A Class Member And Issuing Curative Notice To The Class

The Court should refuse to recognize any release signed by a member of the class. The class as a whole has not yet had notice from the Court or Class Counsel concerning the claims in this litigation, and thus have had no basis to make an informed decision concerning the value of their claims.

Each Class member is entitled to receive full and accurate information about the pending case. *See Kleiner*, 751 F.2d at 1202-03. Defendants are not the parties to impart such information to absent Class members as they "face[] a conflict of interest in advising members on the merits of participation in the lawsuit[.]" *Hampton Hardware*, 156 F.R.D. at 633.

Before surrendering their rights, class members should have the benefit of hearing from Class Counsel, who are already acting as advocates for them. Cf. *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000) (recognizing reduced concern for communication between absent class member and *class counsel*). The substance of the notice can be devised after Class Counsel has been informed of the extent and content of defendants' communications with class members.

Further, given the misleading statements and omission already made, and the implied threat of economic coercion, the Court should invalidate any releases executed before Class members receive corrective notice. *See* 5 Newberg on Class Actions § 15:19 (4th ed.) ("releases from liability . . . obtained by the defendant through misrepresentations or the coercive threat of economic sanctions will not receive judicial approval when challenged.").

Weighing the duties of the Court and Class Counsel to protect the absent Class members against the very slight inconvenience to Defendants, the suggested remedies are appropriate and necessary to carry out the policies of Rule 23.

III. CONCLUSION

For these reasons, Plaintiffs respectfully request this Court grant their motion to preclude Defendants from having further communications with absent Class members, and for other relied as set forth in the accompanying proposed order.

Dated: March 3, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David F. Sorensen, hereby certify that on March 3, 2015, I caused a copy of the foregoing document to be uploaded to the Court's ECF system, where it is available for downloading and viewing by all parties.

/s/ David F. Sorensen
David F. Sorensen