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

KING DRUG COMPANY OF FLORENCE, INC., *et al.*,	)	
Plaintiffs,	)	No. 2:06-cv-1797-MSG
v.	)	
CEPHALON, INC., *et al.*,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO *KING DRUG* PLAINTIFFS' COUNSEL'S "EMERGENCY" MOTION TO PREVENT LEGALLY PERMISSIBLE CLIENT COMMUNICATIONS

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INTRODUCTION

The Direct Purchaser Plaintiffs' Counsel's so-called "emergency" motion presents no emergency and is baseless as a matter of law and fact. The purported "emergency" is their fear that Teva's lawful effort to settle the claims of companies that purchased Provigil would, if successful, reduce counsel's potential fee recovery. Mot. 2, 12 n. 10. This is not an emergency, but an attempt to disrupt legitimate settlement discussions that do not involve—and do not need to involve—Plaintiffs' Counsel. Plaintiffs' Counsel provide no legal or factual basis for their extraordinary request to have this Court interfere with settlement negotiations between sophisticated companies, like the putative class members here. On the contrary, the law is clear that such communications are lawful, and Teva submits declarations from both its settlement negotiator and a renowned ethics expert—Professor Ronald D. Rotunda—that demonstrate the routine and legitimate nature of these settlement discussions.

First, courts have uniformly held that it is entirely lawful and appropriate for a defendant to communicate with putative class members, including for the purpose of exploring and negotiating settlement. *See*, *e.g.*, *Christensen v. Kiewit-Murdoch Inv. Corp.*, 815 F.2d 206, 213 (2d Cir. 1987) (noting that "at least prior to class certification, defendants do not violate Rule 23(e) by negotiating settlements with potential members of a class"). As these cases recognize, such communications are consistent with strong and longstanding judicial policy that encourages settlement, and restricting such communications risks infringing a party's basic First Amendment rights.

Second, it is just as well-settled that even in the situation where two adverse parties are represented by counsel, those parties still may communicate with one another directly, and do not have to go through counsel. As the American Bar Association has stated, it is "sometimes []

desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel." *American Bar Ass'n*, Formal Opinion 11-461 at 1 (Aug. 4, 2011). For this reason, courts overwhelmingly agree that direct business-to-business communications are lawful, even if they relate to settlement. Unsurprisingly, Plaintiffs' Counsel do not cite any case holding that a business trying to settle with another business is improper (whether in the class context or not). They rely, instead, on decisions restricting communications with represented class members only *after* a class has been certified, or where there is an evidentiary showing that the putative class members are particularly susceptible to coercion or have received improper communications from a party. That is worlds away from the situation here, where the communications at issue involve sophisticated, multi-million dollar companies that are more than capable of protecting their own interests.

Unable to square the relief they seek with the overwhelming legal authority that permits the settlement communications they seek to foreclose, Plaintiffs' Counsel resort to false accusations. Without a shred of admissible evidence, they claim that Teva's settlement effort is "coercive" and its communications with putative class members are "misleading." But despite the seriousness of that allegation, the sole support is a self-serving declaration from one of Plaintiffs' Counsel, and all it does is attribute a handful of vague hearsay statements to an unidentified employee of an unidentified putative class member. As a matter of law, this declaration is entitled to no weight. But even if it were admissible, it provides no basis for this Court to find that Teva's communications were in any way coercive, misleading or improper.

All of Teva's communications with putative class members have been reasonable and appropriate. Teva contacted a number of companies—none of which are named plaintiffs—to explore potential settlement of any dispute they might have relating to their purchases of

Provigil. Contrary to Plaintiffs' Counsel's attempt to portray Teva as a schoolyard bully, the business reality is that Teva depends on these companies to buy its products and has a vital interest in maintaining good relations with them. These companies are all sophisticated, multi-million dollar entities that are fully capable of deciding whether to engage in settlement discussions, and whether and on what terms to resolve any dispute they might have relating to their Provigil purchases. Although they range in size, they include some of the largest businesses in the country. Some have their own law departments, and all have access to legal and financial advice and any other information they believe they require to make settlement decisions. And these companies were not in the dark about this lawsuit. As Plaintiffs' Counsel concede, Teva made sure of this by telling them about it. Decl. of Susan C. Segura ("Segura Decl.") [Dkt. 755-3] ¶ 4 ("The Teva executive represented that Teva was the manufacturer of Provigil and that he was calling about an out of court settlement for the Provigil class action."). If any of these companies wanted more information about this lawsuit, all they had to do was ask for it or perform a simple Google search.[1]

For the reasons explained more fully below, Plaintiffs' Counsel are not entitled to any of the relief they seek. In support of this opposition, Teva has included declarations from Professor Ronald D. Rotunda, an expert in legal ethics, who addresses some of the baseless claims made by Plaintiffs' Counsel, and Christopher Doerr, Teva's Senior Director, Trade Operations, who sets the record straight concerning his settlement communications with companies that purchased Provigil.

BACKGROUND

There are only about 18 wholesalers in the putative direct purchaser class. There is no

[1] Even as simple a search term as "Provigil antitrust lawsuit" yields numerous "hits" with information about this lawsuit, the FTC action, some of the key rulings, and the identity of Plaintiffs' Counsel. The idea that these companies are somehow in the dark about this well-publicized litigation does not pass the straight-face test.

mystery about who these companies are: both sides identified them in their class certification submissions and in expert reports. None of the companies Teva has contacted about settlement is a named plaintiff. Christopher Doerr—who is not a lawyer—contacted several of these companies, and two of them have agreed in principle to settle their claims. *See* Decl. of Christopher Doerr ("Doerr Decl."), Ex. A ¶¶ 6-7.

As he explained in his declaration, Mr. Doerr informed business executives at each company that Teva was interested in resolving the parties' dispute in this lawsuit over purchases of Provigil and that Teva was willing to pay a certain sum of money in exchange for settling the putative class member's claims. *Id.* ¶ 9. Each company's business executive either returned the call or informed Mr. Doerr that the appropriate person would call him back. *Id.* ¶¶ 10-11. As to the first company, a senior executive returned Mr. Doerr's call. *Id.* ¶ 10. Mr. Doerr informed him of Teva's settlement offer, which the senior executive said he had evaluated, believed was fair, and accepted. *Id.* Similarly, counsel for the second company contacted Mr. Doerr. *Id.* ¶ 11. Mr. Doerr provided counsel with the case name, docket number, and court, and Teva's settlement offer. *Id.* After further investigating the matter, counsel and a business executive from the company contacted Mr. Doerr and accepted Teva's settlement offer. *Id.* In discussing settlement with each of the companies, Mr. Doerr did not link Teva's offer in any way to its business relationship with the company—much less mention or imply any negative business consequences if the settlement offer was not accepted. *Id.* ¶ 16. Teva intends to and is in the process of finalizing these settlement agreements. *Id.* ¶ 17.[2]

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[2] Plaintiffs' Counsel also imply that Teva's in-house counsel may have had discussions with non-lawyers regarding possible settlement of these matters. *See* Mot. 3. They are wrong. The only discussions Teva's in-house counsel had regarding settlement of these matters were with senior in-house legal personnel of a small number of the putative class members. In other words, Teva's in-house counsel communicated only with the authorized legal counsel for these companies. Such counsel-to-counsel contacts are entirely appropriate. *See, e.g.*, Rotunda Decl., Ex. B ¶ 23.

ARGUMENT

I. Teva's Settlement Discussions With Putative Class Members Are Entirely Lawful.

A. Courts Uniformly Agree That A Defendant May Have Settlement Communications With Putative Class Members.

Courts uniformly agree that it is entirely lawful for a defendant to communicate and negotiate with absent class members. As Professor Rotunda explains in his declaration, "'putative class members are not represented parties for purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period.'" Declaration of Ronald D. Rotunda ("Rotunda Decl."), Ex. B ¶ 20 (quoting ABA Formal Opinion 07-445 (April 11, 2007)).

Numerous courts have agreed with this principle, *id.*, which also has important implications for pre-certification settlement discussions. As the Second Circuit has made clear, "at least prior to class certification, defendants do not violate Rule 23(e) by negotiating settlements with potential members of a class." *Christensen v. Kiewit-Murdoch Inv. Corp.*, 815 F.2d 206, 213 (2d Cir. 1987); *see also, e.g.*, *EEOC v. Albertsons, LLC*, No. 06-cv-01273-WYD-BNB, 2006 U.S. Dist. LEXIS 72378, at *14 (D. Colo. Oct. 4, 2006) ("[T]he general rule is that defendants may communicate with potential plaintiff class members before the class is certified."). This principle is now embodied in the *Manual for Complex Litigation*, which states that "[d]efendants ordinarily are not precluded from communications with putative class members, including discussions of settlement offers with individual class members before certification." *Manual for Complex Litigation (Third)* § 30.24, at 257 (2004); *see also Newberg on Class Actions* § 9:7 (5th ed. 2014) (cited by Plaintiffs' Counsel) ("[C]ourts generally permit the defendant and defendant's counsel to communicate directly with these absent putative class members before a class action is certified. Defendants … may normally enter into settlements with individual potential class members prior to class certification.").

Courts in the Third Circuit have reached the same conclusion. *See, e.g.*, *Jenifer v. Delaware Solid Waste Auth.*, No. 98-270/98-565 MMS, 1999 U.S. Dist. LEXIS 2542, at *10 (D. Del. 1999) ("[B]efore a class action is certified, it will ordinarily not be deemed inappropriate for a defendant to seek to settle individual claims."); *Lester v. Percudani*, No. 01-1182, 2002 WL 1460763, at *2 (M.D. Pa. Apr. 18, 2002) (citing *In re Sch. Asbestos Litig.*, 842 F.2d 671, 680 (3d Cir. 1988) (denying motion to preclude pre-certification communications).

Contrary to Plaintiffs' Counsel's assertion that such communications "undermine the purpose" of Rule 23, Mot. 13, defendants routinely negotiate settlements with putative class members, and courts observe no problem in their doing so. "[A] defendant does nothing wrong by communicating directly with someone who may become, but is not yet, a member of … a class for which certification is sought under [Rule] 23." *Zwerin v. 533 Short North, LLC*, No. 2:10-cv-488, 2011 WL 2446622, at *2 (S.D. Ohio June 15, 2011). After all, putative class members "'do not become wards, incompetent to deal with their own property, by reason of the unilateral filing of class action complaints by one of their number.'" *Albertsons, LLC.*, 2006 U.S. Dist. LEXIS 72378, at *14-15 (quoting *In re Winchell's Donut Houses, L.P. Sec. Litig.*, 1988 WL 135503, at *1 (Del. Ch. Dec. 12, 1988)); *see also* Rotunda Decl., Ex. B ¶ 21. Through the very act of filing this motion, Plaintiffs' Counsel seek to chill settlements and to interfere with discussions between sophisticated parties. This is wholly improper conduct by Plaintiffs' Counsel.

In *Marino v. Sports Authority*, for example, this Court noted, in the context of analyzing a motion for class certification under Rule 23, that of the 15 absent class members, "twelve claims have been settled and paid by [defendant]." 940 F. Supp. 792, 797 (E.D. Pa. 1996). Far from raising any concerns with such settlements, the Court took the settlements into consideration

when deciding the class certification motion under Rule 23. *Id.* Likewise, in *Simms v. Jones*, which involved a dispute over restricted-view Super Bowl seats, a Texas federal court held (also in the Rule 23 context) that it was not improper for the defendant National Football League to settle the claims of the majority of putative class members. 296 F.R.D. 485, 499 (N.D. Tex. 2013); *see also Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1310 (9th Cir. 1977); *Rawat v. Navistar Int'l Corp.*, 08-CV-4305, 2011 WL 222131, at *6 (N.D. Ill. Jan. 20, 2011); *Nesenoff v. Muten*, 67 F.R.D. 500, 503 (E.D.N.Y. 1974).

Communications between a defendant and putative class members are not only lawful, but often desirable. That is "especially true where," as here, "a defendant has an on-going business relationship with potential class members." *Albertsons, LLC*, 2006 U.S. Dist. LEXIS 72378, at *14. After all, beyond the "need to communicate with class members as part of their business activities," "putative class members may be interested in receiving settlement offers or in hearing a defendant's perspective on the litigation." *Id.* (internal quotation marks omitted); *see also* Rotunda Decl., Ex. B ¶ 21.d.

Plaintiffs' Counsel's speculation that Teva in-house counsel may have assisted Mr. Doerr in some way, Mot. 3, does not change anything. *See* Mot. 2 (asserting only that "Teva had one of its executives telephone a non-lawyer absent [class] member"). As the ABA has concluded, even in the situation where, unlike here, the business-to-business communication is with a represented party, "a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary" that can include "the subjects or topics to be addressed, issues to be raised and strategies to be used." ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 11-461 (2011); *see* Rotunda Decl., Ex. B ¶ 21.c.

B. Plaintiffs' Counsel's Cases Are Irrelevant To This Case.

In the face of this overwhelming caselaw, Plaintiffs' Counsel do not cite *any* authority for

the proposition that settlement discussions between Teva and sophisticated putative class members are unlawful. They rely, instead, on a slew of off-the-mark decisions involving (1) communications with unsophisticated putative class members where there is *evidence* of coercive or misleading statements or of the absent class members' particular susceptibility to coercion, and (2) communications that conflicted with the duties of the parties or the Court after a class is certified under Rule 23. These cases are inapposite, and none contradicts the established law approving of such communications.

First, this is not a situation where a defendant tried an "end run around the court's supervisory powers" by sending out communications that conflicted with the Court's authority once a class is certified under Rule 23. *Gainey v. Occidental Land Res.*, 231 Cal. Rptr. 249, 253 (1986) (defendant disseminated its own unapproved notice to class members after certification and after the court approved a different notice). For example, in *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1200, 1202 (11th Cir. 1985) (cited at Mot. 8, 10), after the class was certified and the court had assumed responsibility for notifying class members of their rights, the defendant—while the judge was on vacation—directly disobeyed a court order limiting its communications with class members by undertaking a telephone campaign asking over 3,000 class members to opt out. Likewise, in *Recinos-Recinos v. Express Forestry, Inc.*, No. Civ.A. 05-1355, 2006 WL 197030, at *3 (E.D. La. Jan. 24, 2006) (cited at Mot. 9 n.8), after a class was provisionally certified, defendants "request[ed] that the district court prescribe the notice to be sent to the putative class, noting that the description of the lawsuit must be neutral and balanced," before turning around and "launching an organized campaign designed to frighten, coerce and intimidate plaintiffs into withdrawing their claims." *See also Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 666 (E.D. Tex. 2003) ("In spite of its own arguments against one party having

unreviewed contact with absent class members and the Court's efforts to create a notice fair to all parties, Defendants unilaterally mailed their own letter to the absent class members just before the Court's sanctioned notice was to be sent.") (cited at Mot. 7, 12). Of course, here there has been no order certifying a class, much less an order that would restrict Teva's ability to communicate with putative class members.

Second, Plaintiffs' Counsel point to cases in which parties communicated with unsophisticated putative class members where there was evidence of actual coercion or their particular susceptibility to coercion. For example, several of Plaintiffs' Counsels' cases involve an employer-defendant threatening the livelihoods of its at-will employees (the putative class members). *See Recinos-Recinos*, 2006 WL 197030, at *12 (in lawsuit brought by seasonal workers, forestry company made in-person threats and bribes to members of "the potential class, [which] consists largely of impoverished Guatemalan migrant workers who lack familiarity with their rights and the legal system") (cited at Mot. 9 n.8); *Belt*, 299 F. Supp. 2d at 668 (in lawsuit by nurses for unpaid wages, clinic "exploited this relationship by preying on fears and concerns held in the medical community and by suggesting that this action could affect the potential class members' employment" as well as "'affect ongoing clinical operations' in an attempt to frighten potential class members from joining") (cited at Mot. 7); *Ojeda-Sanchez v. Bland Farms*, 600 F. Supp. 2d 1373, 1381 (S.D. Ga. 2009) (in lawsuit brought by "itinerant" workers with a "past as well as future employment relationship" with defendant, defendant told the workers that they "would not be rehired if they participated in litigation," misleadingly telling one plaintiff "proceeding with the lawsuit would be futile because he was the only one complaining," and that the absent class members should not speak with class counsel "because they could steal one's identity and never return to help you") (cited at Mot. 13); *Abdallah v. Coca-Cola Co.*, 186

F.R.D. 672, 673 (N.D. Ga. 1999) (racial discrimination action by employees against Coca-Cola) (cited at Mot. 9 n.8); *Mevorah v. Wells Fargo Home Mortg., Inc.*, No. C 05-1175 MHP, 2005 WL 4813532, at *4 (N.D. Cal. Nov. 17, 2005) (employer "attack[ed] [] the absent class members' status as 'professionals' in the workplace" and putative class member testified that she would have felt "forced" to agree to a "manipulated" declaration "in order to continue her employment" with defendant) (cited at Mot. 9 n.8). Plaintiffs' Counsel's other cases involve unsophisticated parties (usually individuals) who were entirely dependent on the defendants for their livelihood. *See, e.g.*, *Kleiner*, 751 F.2d at 1202 (putative class members were individual borrowers who had no other source of credit for future financing and whose own financial situations likely required "discretionary financial indulgence from their loan officers"); *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630, 631-33 (N.D. Tex. 1994) (putative class members were members of the defendant-cooperative hardware supplier, who urged class members not to participate, with no offer to settle); *Ralph Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 99 Civ. 457 (AGS), 2001 WL 1035132, at *1-2 (S.D.N.Y. Sept. 7, 2001) (putative class consisted of General Motors dealers, "have no other source of GM vehicles" other than defendant General Motors and thus whose "continued success and [] existence may depend upon GM's goodwill").

That is nothing like the situation here. The direct purchaser putative class members are sophisticated companies with significant resources and experience in the pharmaceutical business and with these types of cases. The companies have annual revenues ranging from several million dollars to tens of billions of dollars. Ex. 2 to Rotunda Decl., Ex. B. Many of the putative class members have been named plaintiffs in similar lawsuits, demonstrating their

experience with these type of cases.[3] This is a far cry from cases in which a large company reached out to individuals, or an employer reached out to an employee.

Plaintiffs' Counsel try to create a specter of influence by arguing that Teva has an "ongoing business relationship" with the putative class members. Mot. 9. But this is not enough to be inherently coercive and justify restrictions on communications. Courts routinely recognize that ongoing business partners, especially sophisticated ones like here, are more than capable of negotiating and communicating about a case without judicial intervention. *See Burrell v. Crown Cent. Petroleum Inc.*, 176 F.R.D. 239, 243-44 (E.D. Tex. 1997) (refusing to impose restrictions on communications with putative class members simply based on their "ongoing commercial relationship" with defendant because restrictions cannot be justified "[a]bsent a clear record and specific findings of realized or threatened abuses"). For example, in *Jenifer v. Delaware Solid Waste Authority*, No. CIV.A. 98-270 MMS, 1999 WL 117762, at *6 (D. Del. 1999), the court found that there was no inherent coercion in an ongoing commercial relationship between waste haulers in the putative class were sophisticated parties who had "significant knowledge" of the law and facts governing the waste industry on which the lawsuit was based, "underst[ood] the benefits of such litigation," had access to legal counsel, and believed their own negotiations with the defendant "will produce a settlement equal to or better than that which may be reached by" the class. As a result, the putative class members were "free to weigh the risks and benefits of

[3] *See, e.g., Amerisourcebergen Drug Corp. v. Dgn Pharmacy, Inc.*, No. 2:14-cv-202 (E.D. Pa. 2014); *Drogueria Betances, Inc. v. Endo Pharms., Inc. et al.*, No. 3:14-cv-1573 (E.D. Pa. 2014); *Value Drug Co. V. Abbott Labs. et al.*, No. 02:13-cv-3124 (E.D. Pa. 2013); *Miami-Luken, Inc. v. Boehringer Ingelheim Pharma. GMBH & Co.*, No. 02:13-cv-6543 (E.D. Pa. 2013); *Kissei Pharm. Co. Ltd. v. Hetero Usa Inc.*, No. 01:13-cv-1091 (D. Del. 2013) (Anda is a named plaintiff); *King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp. et al.*, No. 02:12-cv-1607 (D.N.J. 2012); *HD Smith Wholesale Drug Co. v. Boca Pharmpac, Inc.*, No. 00:11-cv-60545 (S.D. Fla. 2011); *The Harvard Drug Group, LLC v. Purdue Pharma, LP et al.*, No. 1:07-cv-1939 (S.D.N.Y. 2007); *Dik Drug Co. et al. v. Altana Pharma AG et al.*, No. 02:07-cv-5849 (D.N.J. 2007); *Burlington Drug Co., Inc. et al v. Astrazeneca Pharms. LP et al.*, No. 01:07-cv-41 (D.D.C. 2007); *Rochester Drug Co-Operative, Inc. v. Braintree Labs*, No. 1:07-cv-00142 (D. Del. 2007); *Louisiana Wholesale Drug Co., Inc. v. Becton Dickinson & Co., Inc.*, No. 02:05-cv-1602 (D.N.J. 2005) (Smith Drug); *Morris & Dickson Co., LLC v. Abbott Labs.*, No. 5:05-cv-2147 (W.D. La. 2005); *Procter & Gamble Co. et al v. Stone Container Corp et al.*, No. 2:03-cv-5231 (E.D. Pa. 2003) (Cardinal Health is a named plaintiff); *McKesson Corp. v. Twenty Four Twelve*, No. 2:97-cv-1865 (E.D. Pa. 1997).

participating in the class action" without judicial supervision of their settlement efforts. *Id.* at *5; *see also, e.g.*, *The Kay Co. v. Equitable Prod. Co.*, 246 F.R.D. 260, 261 (S.D. W.Va. 2007) (refusing to restrict communications despite ongoing business relationship because putative class members were "large, sophisticated landowners" who "have access to legal counsel for purposes of the settlement negotiations").

As a result, Plaintiffs' Counsel's assertion that Teva's relationship with the absent class member is inherently coercive, *see* Mot. 10, blinks at reality. The regional wholesalers contacted by Teva are "direct purchasers" of pharmaceuticals "in the industry at issue in the class action." *Keystone Tobacco Co., Inc. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 155-56 (D.D.C. 2002) (refusing to restrict communications of "not unsophisticated" direct purchasers). Contrary to Plaintiffs' Counsel's unsupported assertion, the wholesalers do not "depend on Teva … for their livelihood." Mot. 1. As Mr. Doerr has explained, the majority of drugs Teva sells are generic drugs, and "[w]ith rare exceptions, for each generic drug Teva sells, there are multiple alternative generic versions of the same drug available from other drug manufacturers that compete with Teva" and from whom the regional wholesalers can purchase. Doerr Decl., Ex. A ¶ 4. If anything, Teva depends on the regional wholesalers for its sales (not the other way around), and Teva's business interest is in "maintain[ing] good relations with them." *Id.* ¶ 16. All of them are multi-million dollar enterprises (some with revenues in the tens of billions), and all could readily avail themselves of advice from their own counsel or contact Plaintiffs' Counsel—*precisely as several did here*, *see* Segura Decl. [Dkt. 755-3] ¶ 3]; Doerr Decl., Ex. A ¶¶ 11-12. Because the putative class here is "comprised of persons with whom [Teva] has an ongoing commercial relationship" and who are sophisticated businesses in the pharmaceutical industry with business relationships with Teva, *see* Doerr Decl., Ex. A ¶ 7, "it would seem distinctly ill-advised to []

require the defendant to deal with what may be an important aspect of a commercial relationship only through the channel of a self-appointed class-action plaintiff." *In re Winchell's Donut Houses L.P. Sec. Litig.*, 1988 WL 135503, at *1 (Del. Ch. Dec. 12, 1988). While it is true that Teva is a large manufacturer of generic pharmaceutical products, Plaintiffs' Counsel provide no evidence to support the implication that the putative class members are unable to take into account their own business interests in deciding whether to settle litigation. Thus, there is no basis whatsoever for any claim of undue influence.[4]

II. Plaintiffs' Counsel Put Forward No Evidence That Would Warrant Any Restriction On Teva's Lawful Settlement Negotiations.

In the face of this settled law, Plaintiffs' Counsel try to assert that Teva's communications with putative class members were coercive and misleading. This is a serious accusation, and one would expect Plaintiffs' Counsel to support it with evidence. But there is none. Moreover, even assuming everything Plaintiffs' Counsel assert were true, the communications attributed to Teva *still* do not warrant any restriction on Teva's lawful settlement communications.

A. Plaintiffs' Counsel's Motion Is Supported By No Evidence Whatsoever.

As even Plaintiffs' Counsel acknowledge, any restrictions on a defendant's right to communicate and negotiate with putative class members must be "based on a clear record and specific findings," with only a proven "likelihood of serious abuses" rather than "the mere

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[4] The only other authority Plaintiffs' Counsel cite addresses whether an *attorney* violates ethical rules by contacting a represented, *non-attorney* putative class member. *See Mevorah v. Wells Fargo Home Mortg., Inc.*, No. C 05-1175 MHP, 2005 WL 4813532, at *1 (N.D. Cal. Nov. 17, 2005) (cited at Mot. 9 n.8) (allegations that "defendant, through counsel, has contacted members of the potential class"); *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001) ("We are faced with an issue of professional conduct. May a defense attorney interview potential witnesses in an individual injury action when the potential witnesses are also putative class members in a state court action involving the same alleged tortious conduct and when the interviews are to be conducted without the consent of the attorney who initiated the state court action?") (cited at Mot. 7). That, of course, is not the situation here. According to Plaintiffs' Counsel's motion, a "Teva executive" contacted "a non-lawyer absent member" about settlement, Mot. 2, and Plaintiffs' Counsel does not claim that any rules of professional conduct were violated by any attorneys in this case. And the only discussions involving counsel were counsel-to-counsel communications.

possibility of abuses" sufficient to justify any restrictions. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, 104 (1981); *see* Mot. 8 (citing *In re Sch. Asbestos Litig.*, 842 F.2d at 680). Because restrictions on Teva's communications with putative class members would threaten its freedom of speech, Plaintiffs' Counsel "carr[y] a heavy burden of showing justification for the imposition of such a restraint." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *see also, e.g.*, *Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988) (applying a "heavy presumption against [] constitutional validity" in vacating court order prohibiting corporate party from discussing case with the press and opposing party's customers); *see also* Rotunda Decl., Ex. B ¶ 18 & n.2.

But Plaintiffs' Counsel do not offer *any* evidence or identify a *single* statement made by Teva to any putative class member—let alone a statement that was misleading or coercive. Plaintiffs' Counsel have put forward only a single declaration by their own counsel, who offers *no* first-hand knowledge of any communications between Teva and the unidentified class member. *See* Segura Decl. [Dkt. 755-3]. Courts routinely disregard such attorney's affidavits for at least two reasons, and this Court should follow suit.

First, Plaintiffs' Counsel's declaration is inadmissible hearsay-within-hearsay and cannot be considered here. The declaration offers only one attorney's report of what an unidentified putative class member supposedly relayed about what Teva's unidentified employee said—and offers it for the truth of what the absent class member asserted was said by the Teva employee. *See* Fed. R. Evid. 801(c) (defining inadmissible hearsay as out-of-court statements offered "to prove the truth of the matter asserted in the statement"). The Third Circuit and Courts in this District have routinely refused to play that game of telephone. *See, e.g.*, *Smith v. City of Allentown*, 589 F.3d 684, 694 (3d Cir. 2009) (affirming refusal to consider double hearsay at

summary judgment); *Knit With v. Knitting Fever, Inc.*, Nos. CIV.A. 08-4221, 08-4775, 2012 WL 2466616, at *3 (E.D. Pa. June 27, 2012) ("As a general rule, declaration statements made based on hearsay statements by others should not be considered."). Tellingly, Plaintiffs' Counsel do not even try to provide a basis for this Court to rely on the hearsay-filled declaration. Plaintiffs' Counsel's failure to offer *any* declaration based on personal knowledge, such as from the unidentified absent class member, only underscores why the lawyer declaration is entitled to little weight.[5] *See, e.g.*, *Yong-Shao Ma v. Attorney Gen. of U.S.*, 418 F. App'x 119, 120 (3d Cir. 2011) (affirming an agency's decision to "discount[] the weight of the evidence in the affidavit because it was based on hearsay"); *Oakes v. Henkels & McCoy*, No. CIV.A. 02-2749, 2002 WL 32107616, at *1 (E.D. Pa. Dec. 10, 2002) (granting summary judgment over the "flimsy" weight of "plainly inadmissible" hearsay in an affidavit"); *Kramer v. Novak*, No. CIV. A. 95-3170, 1996 WL 97838, at *3 (E.D. Pa. Mar. 1, 1996) (declining to consider portion of affidavit based on inadmissible hearsay).

Second, courts in this District and elsewhere routinely refuse to give any weight to attorney's affidavits like the one submitted by Plaintiffs' Counsel. *See, e.g.*, *United States v. Maldonado-Rivera*, 922 F.2d 934, 972 (2d Cir. 1990) ("The [district] court properly declined to credit the attorney's affidavit because it was not based on the attorney's personal knowledge"); *Scholtisek v. Eldre Corp.*, 697 F. Supp. 2d 445, 457 (W.D.N.Y. 2010) ("Since [a]n attorney's affidavit that is not based on personal knowledge carries no weight . . . these assertions have no

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[5] Plaintiffs' Counsel try to justify their decision to hide the absent class member's identity "out of concern of retaliation from defendants." Mot. 2 n.2. That excuse fails. Plaintiffs have offered *no* evidence that Teva has threatened or would threaten retaliation, and Teva has put in evidence directly contradicting this claim. *See* Doerr Decl., Ex. A ¶ 16. Even Plaintiff's declaration does not show any risk of retaliation, instead revealing only that the unidentified class member has relayed a conclusory and unjustified "fear" that its relationship with Teva would be affected. *See* Segura Decl. [Dkt. 755-3] ¶ 8. That "mere possibility" of retaliation is insufficient to justify any restrictions on Teva's communications with putative class members. *Gulf Oil*, 452 U.S. at 104. Plaintiffs' proposal to submit the absent class member's identity *in camera*, Mot. 2 n.2, is no solution at all. Plaintiffs do not offer any authority for asking a court to restrict constitutionally protected speech based on secret evidence to which the alleged speaker is denied access.

probative value.") (internal quotation marks and citation omitted). As a Court in this District has explained, an attorney's affidavit "is deficient because it is not based on personal knowledge," but rather on the "second-hand" (and in this case, third-hand) "information derived from conversations with another [person]." *C.C. Insulators, Inc. v. Schnabel Assocs., Inc.*, Civ. A. No. 90-7640, 1991 WL 58496, at *2 (E.D. Pa. Apr. 11, 1991); *see also In re Asbestos Sch. Litig.*, No. 83-0268, 1990 WL 20221, at *2 (E.D. Pa. Feb. 28, 1990) (striking attorney's affidavit for lack of personal knowledge).

The hearsay-within-hearsay in the attorney declaration here stands in stark contrast to the evidence provided to courts in cases cited by Plaintiffs' Counsel that restricted communications. *See, e.g.*, *Recinos-Recinos*, 2006 WL 197030, at *7 ("competent evidence consisting of eleven witnesses' affidavits and live testimony" based on personal knowledge). This Court cannot make "specific findings" on a "clear record" to chill Teva's constitutionally protected communications, *Gulf Oil*, 452 U.S. at 101, based on a lawyer's self-serving hearsay-laden declaration.

B. Even If Plaintiffs' Counsel's Accusations Were Taken At Face Value—And They Should Not Be—There Is Still No Basis To Restrict Teva's Lawful Communications.

Even if Plaintiffs' Counsel's third-hand story were assumed to be true—despite the lack of evidence supporting it, and the fact that Teva has submitted evidence showing it is not true—it still would not support restrictions on Teva's communications with putative class members. The statements the Teva employee is accused of making in the motion, Mot. 9-13, are not coercive or misleading, and provide no basis to stand in the way of settlement negotiations.

1. Plaintiffs' Counsel Do Not Identify Any Coercive Statements By Teva.

As to their accusations of coercive statements, Plaintiffs' Counsel point to only a single, unsupported assertion that Teva "alluded to 'negative' role of continued litigation in its

communication with an absent class member." Mot. 10. As an initial matter, the *most* Plaintiffs' Counsel accuse Teva of is "*allud[ing]*" to negative aspects of litigation; they do not even accuse Teva of actually saying this. Indeed, Plaintiffs' Counsel do not identify any specific statement made by the Teva employee. This case is thus nothing like the cases cited by Plaintiffs' Counsel. *Cf., e.g.*, *Recinos-Recinos*, 2006 WL 197030, at *12 (in-person threats and bribes to members of "the potential class, [which] consists largely of impoverished Guatemalan migrant workers who lack familiarity with their rights and the legal system"); *Mevorah*, 2005 WL 4813532, at *4 (employer "attack[ed] [] the absent class members' status as 'professionals' in the workplace" and putative class member testified that she would have felt "forced" to agree to a "manipulated" declaration "in order to continue her employment" with defendant); *Hampton Hardware*, 156 F.R.D. at 632-33 (letters warning absent class members "of the potential cost [of the lawsuit] to them," "specifically advis[ing] [them] not to participate in the lawsuit," and telling them "that by participating in the lawsuit they are suing themselves").

Moreover, as Mr. Doerr explains in his declaration, he made no such threat and in fact did not in any way tie the settlement discussions to the parties' overall business relationship. *See* Doerr Decl., Ex. A ¶ 16. In any event, there are undeniably "negative aspects of litigation," including uncertainty, expense, and distraction. Indeed, this is precisely why parties settle litigation every day—as even one of the putative class members contacted by Teva made clear. *See id.* ¶ 10 ("The senior executive told me that his company is aware of class actions like this one, but does not like to be in litigation. As a result, when it has the opportunity to settle a case, it typically pursues that opportunity.").

Given this, Plaintiffs' Counsel go even further, and puts its own biased spin on the alleged allusion, opining that the Teva employee was "threat[ening] [] potential negative

ramifications to the relationship with Teva should there be no settlement." Mot. 10. Again, however, Plaintiffs' Counsel have just invented this from whole cloth. Neither the motion nor the self-serving declaration alleges that any threat was made, or even implied. On the contrary, the declaration attributes (again, without any support) only the benign statement that "legal actions create a negative relationship that no one wants." Segura Decl. [Dkt. 755-3] ¶ 7. The admissible evidence put in by Teva directly contradicts this baseless allegation. *See* Doerr Decl., Ex. A ¶ 16. As such, there is no basis whatsoever to restrict Teva's legitimate settlement discussions.

2. Plaintiffs' Counsel Do Not Identify Any Misleading Statements By Teva.

Although Plaintiffs' Counsel regurgitate a list of information that was allegedly omitted from Teva's negotiations with the absent class member, Mot. 11-12, that entire section of their motion does not point to any evidence and does not cite any authority that even mentions, let alone imposes, those duties of disclosure on a defendant. For good reason: there are no such duties—especially where, as here, the negotiations are between two sophisticated businesses with a longstanding arm's-length relationship. Indeed, what Plaintiffs' Counsel are really arguing is that the Mr. Doerr (a non-lawyer) did not provide legal advice to the business persons with whom he spoke. *See* Rotunda Decl., Ex. B ¶ 22.

First, Plaintiffs' Counsel assert that Teva's employee did not "advise the [putative] class member of Teva's total potential liability in the case, and the full value of the class member's claim." Mot. 11. But that is a hotly contested issue, and the wholesalers here know the details regarding their Provigil purchases and can make their own determinations about what they consider an acceptable settlement amount. In any event, Plaintiffs' Counsel cite no authority for the proposition that a settlement proposal is coercive if it does not include the type of valuation

information that Plaintiffs' Counsel contend should be provided. There is no such duty of disclosure.

Second, Plaintiffs' Counsel complain that Teva did not not inform the wholesalers of various aspects of this case's procedural history, such as the Court's denial of summary judgment, the upcoming class-certification hearing, and the upcoming FTC trial. Mot. 12. But that information is all a matter of public record and readily available if the wholesalers had any interest in it. They could have obtained it in many ways, including through some simple Internet searches. Again, Plaintiffs' Counsel do not cite any authority imposing a duty to recount publicly-available information about a case's procedural status.

Third, Plaintiffs' Counsel claim that Teva should have told the absent class member that any settlement would not only release claims again Teva, but also against Cephalon and Barr due to their acquisition by Teva. Mot. 12. Again, there is no evidence supporting this claim, which both presupposes an incredible lack of knowledge on the part of the putative class members (who, as members of this industry, are certainly at least on notice that all three companies are affiliated), and ignores how settlements work. Any settlement of a case like this one would be subject to a written settlement agreement, which of course would lay out any relevant provisions regarding a release, including whether it applies to subsidiaries.

Fourth, Plaintiffs' Counsel complain that Teva did not provide the wholesalers "with a copy of the complaint or contact information for [Plaintiffs'] Counsel." Mot. 12. But the complaint is a publicly-available document, and the wholesalers had all of the information they needed to locate it if they were interested in doing so. As Plaintiffs' Counsel concede, Teva made clear that it was "calling about an out of court settlement for the *Provigil class action*." Segura Decl. [Dkt. 755-3] ¶ 4 (emphasis added). And, as Plaintiffs' Counsel's declaration

shows, putative class members have no difficulty identifying and contacting Plaintiffs' Counsel, or counsel of their choice, should they elect to do so. *See id.* ¶¶ 3, 8; *see also* Doerr, Decl., Ex. A ¶¶ 11, 15.

Fifth, according to Plaintiffs' Counsel, Teva "failed to advise that the amount of any settlement reached is subject to being reduced to pay for fees and costs incurred by [Plaintiffs'] Counsel." Mot. 12. As an initial matter, Plaintiffs' Counsel again point to no authority whatsoever that would impose any such duty on Teva, especially when talking to sophisticated businesses. Moreover, it is far from clear that any such statement would be true in any event. The general rule is that class members that opt out of a class action, even *after* a class has certified (much less beforehand) "are not paying counsel's fees." *Newberg on Class Actions* § 13:27 (5th ed. 2014); *see also Wright v. Schock*, 742 F.2d 541, 545 (9th Cir. 1984). The one case Plaintiffs' Counsel cite, *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 661 (E.D. Pa. 2003), was a self-described "rare" case where *after* a class had been certified and *after* a settlement had been reached, certain class members attempted to opt out of the class, file their own lawsuits, and then reach individual settlements with the defendants based on the work done by class counsel. That is a far cry from an independent decision by a sophisticated party to opt out of the class and pursue its own resolution of the dispute before a class is even certified. In any event, the issue of fees is a matter between Plaintiffs' Counsel and the putative class members.

This argument reveals that the real purpose of Plaintiffs' Counsel's motion is to maximize their potential fee award and stake a claim to a share of every settlement payment that occurs in this case. By thwarting Teva's settlement effort, they seek to advance their own financial interests. That is greatly improper, and it runs counter to the long line of authority

holding that the courts favor resolution of disputes through settlement. *See, e.g.*, *Wilcher v. City of Wilmington*, 139 F.3d 366, 372 (3d Cir. 1998) ("As a general rule, we encourage attempts to settle disagreements outside the litigative context."); *D.R. by M.R. v. E. Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997) ("Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by courts.").

III. Plaintiffs' Counsel Is Not Entitled To Any Relief, Much Less Discovery Or An Evidentiary Hearing.

There is no legal support for the relief Plaintiffs' Counsel seek, which is completely at odds with the law that permits communications with absent class members. As courts have uniformly held, there is *no* requirement that defendants obtain prior approval of their communications with absent class members. *See, e.g.*, *Bublitz v. E.I. DuPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000) (in lawsuit brought by employees against employer, the defendant's "wish to offer [the putative class members] a settlement offer and have other related communications with them" did "not support a requirement that all such communication must first be approved by either the Court or Plaintiffs"); *see supra* Part I.A. Courts routinely refuse to insert themselves into pre-certification settlements with putative class members. *See, e.g.*, *In re Baycol Prods.*, No. MDL 1431MJD/JGL, 2004 WL 1058105, at *3 (D. Minn. May 3, 2004) (citations omitted) ("[S]ince no . . . class has yet been certified, Defendants have a right to negotiate settlements with prospective class members. At this point, [those] who choose to settle are merely opting out of the class. Thus, the Court finds that it does not have original jurisdiction over [those] who have not previously submitted to its jurisdiction, and that private negotiations between Defendants and these [absent class members] are entirely proper."); *Hinds Cnty., Miss. v. Wachovia Bank N.A.*, 790 F. Supp. 2d 125, 132 (S.D.N.Y. 2011) (rejecting plaintiffs' "request

that the Court regulate potential settlements offered to putative class members by subjecting th[ose agreements] to fairness procedures" because "a district court may not prevent an extrajudicial settlement prior to class certification").

Indeed, as the Supreme Court and Third Circuit have held, a court cannot restrict settlement communications with absent class members without "a clear record and specific findings" resulting in a "carefully drawn order that limits speech as little as possible." *Gulf Oil*, 452 U.S. at 101-02; *see also*, *e.g.*, *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977) (requiring "a specific record showing by the moving party of the particular abuses by which it is threatened" and permitting only the "narrowest possible relief which would protect the respective parties").

As such, Plaintiffs' Counsel's demand for a blanket order "directing that the Defendants may not communicate with absent Class members about this case," Mot. 16, is contrary to the law and unconstitutional. "The requirement of court approval for precertification communications is a classic example of a prior restraint on speech." *Parris v. Super. Court*, 135 Cal. Rptr.2d 90, 99 (2003) (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975)). Plaintiffs' Counsel's "heavy burden" to justify that restriction requires proof that Teva's communications with absent class members "surely [will] result in direct, immediate, and irreparable damage." *N.Y. Times Co. v. United States*, 403 U.S. 713, 730 (1971). Tellingly, Plaintiffs' Counsel do not offer *any* argument or authority in support of such a prior restraint. *See* Mot. 17; *see also Corbeil v. Cahill III*, No. 1:13-cv-1323, 2014 WL 1234488, at *4 n.3 (M.D. Pa. Mar. 25, 2014) ("[F]ailure to raise an argument in one's opening brief waives it.") (internal quotation marks omitted).

Indeed, the very authority cited by Plaintiffs' Counsel bears out the impropriety of banning communications. Even after finding potential or actual coercion—which is not present

here—the courts in those cases continued to allow the defendant to communicate with absent class members so long as it was clear that the absent class members were notified of the dispute—which Teva has steadfastly done in its communications with putative class members here. *See* Doerr Decl., Ex. A ¶¶ 9-12; *see also, e.g.*, *Ralph Oldsmobile*, 2001 U.S. Dist. LEXIS 13893, at *15 (after finding potential coercion, holding that "the appropriate remedy is to require that notice [of the lawsuit] be given" by the defendant in its efforts to settle with putative class members); *Abdallah*, 186 F.R.D. at 679 (permitting Coca-Cola to continue to "share its views about th[e] lawsuit with its employees," the absent class members, so long as Coca-Cola informed absent class members that these views were Coca-Cola's and that retaliation is unlawful).

Plaintiffs' Counsel's request that this Court invalidate any settlements or prevent the entry of future settlements is equally meritless. Mot. 16. This request is akin to asking the Court to invalidate contracts agreed to by sophisticated business parties to prevent such parties from entering into such settlements in the first place, as they see fit. Plaintiffs' Counsel provide no authority that would justify this Court taking such action. And there is no such requirement in Rule 23, which requires the Court's approval only for settlement or dismissal of the claims of a "certified class," not those of a putative class member where a class has not been certified. *See also, e.g.*, *Weight Watchers of Phila., Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 775 (2d Cir. 1972) ("[Rule] 23(e), requiring court approval of the dismissal or compromise of a class action, does not bar non-approved settlements with individual members which have no effect upon the rights of others."). The Court should "not disrupt concluded transactions at the behest, not of the [absent class members] who have been paid and satisfied, but of class counsel who have a personal stake in expanding the size of the class." *Cada v. Costa Line, Inc.*, 93 F.R.D. 95,

100 (N.D. Ill. 1981) (refusing to void pre-certification settlements).

Finally, Plaintiffs' Counsel's request for discovery and an evidentiary hearing are both meritless attempts to try and interfere with legitimate settlement discussions.[6] Mot. 15. As shown above, Plaintiffs' Counsel have put forward not one piece of evidence supporting their claims, while, in contrast, Teva has come forward with evidence refuting them. Thus, there is no basis for a finding that anything improper has occurred in these routine business-to-business communications. Even in cases in which defendants "have already shown a willingness to intimidate and/or retaliate against" class members—which is not the case here—courts have denied discovery related to pre-certification communications with putative class members. *See, e.g.*, *Clincy v. Galardi S. Enters., Inc.*, No. 1:09-cv-2082-RWS, 2010 WL 966639, at *3-4 (N.D. Ga. Mar. 12, 2010). And this makes sense: Settlement negotiations and communications are confidential, and are protected from disclosure. Parties have no obligation to discuss who they are negotiating with, the status of those negotiations, or the terms of those negotiations.

Discovery and an evidentiary hearing would achieve nothing, but would advance Plaintiffs' Counsel's goal of impeding sophisticated parties from resolving their litigation claims through settlement. Such delays, and the other relief sought by Plaintiffs' Counsel, would elevate Plaintiffs' Counsel's own financial interests above the litigation interests of both Teva and the putative class members that wish to resolve their claims through settlement. As Plaintiffs' Counsel have put forward no legal or factual basis justifying their extraordinary

[6] Similarly, Plaintiffs' Counsel's request for a curative notice advising absent class members of the class action, Mot. 16, is a solution in search of a problem. Plaintiffs' Counsel's own declaration makes clear that the putative absent class member was aware that the Teva employee "was calling about an out-of-court settlement for the Provigil class action," and the putative class member had no difficulty identifying and contacting Plaintiffs' Counsel. Segura Decl. [Dkt. 755-3] ¶ 4. Plaintiffs' Counsel's own authority demonstrates that a curative notice is unwarranted where, as here, there is no evidence of abusive communications "discourag[ing] [absent class members] from participating" in the lawsuit. *See, e.g.*, *Abdallah*, 186 F.R.D. at 678 (despite finding that "the danger of coercion is real" between an employer and employee putative class members, refusing to require a curative notice).

request, the motion should be denied.

CONCLUSION

For these reasons, Defendants respectfully submit that the Court should deny Plaintiffs' Counsel's "emergency" motion.

Dated: March 6, 2015

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CERTIFICATE OF SERVICE

I certify that on the date set forth below the foregoing was electronically filed using the Court's CM/ECF system, and the documents are available for downloading and viewing from the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the CM/ECF system.

/s/ Joseph Wolfson
Joseph Wolfson

Date: March 6, 2015