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' BRIEF IN OPPOSITION TO *KING DRUG* PLAINTIFFS' COUNSEL'S "EMERGENCY" MOTION TO COMPEL DISCOVERY REGARDING LEGALLY PERMISSIBLE AND CONFIDENTIAL CLIENT SETTLEMENT COMMUNICATIONS AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR PROTECTIVE ORDER

INTRODUCTION

The Direct Purchaser Plaintiffs' Counsel's latest "emergency" motion seeks inappropriate "discovery" regarding the Teva Defendants' lawful settlement negotiations with sophisticated companies who are alleged to be members of a putative class of direct purchasers. Plaintiffs' Counsel has not shown "good cause" for any such discovery. *First*, the discovery sought is not relevant or necessary, because the Teva Defendants' communications with absent class members are permissible *as a matter of law*. *Second*, because such communications are permissible, courts have repeatedly denied similar discovery requests. *Third*, no good cause exists for such discovery because Plaintiffs' Counsel is free to seek such information through other means, *i.e.*, to the extent they have not already done so, they are free to communicate directly with the putative class members themselves. *Fourth*, for good reason, settlement communications are confidential and public policy in favor of settlement mandates their protection.

Plaintiffs' Counsel's request for discovery is nothing more than an attempt to chill legitimate settlement discussions. Settlement communications are confidential. A party has no obligation to disclose whether it is in settlement discussions, or the details regarding those discussions, and Plaintiffs' Counsel cites no law to the contrary. Through the very act of filing this motion, Plaintiffs' Counsel seek to deter discussions between sophisticated parties, and prevent the desirable settlement of disputes. This is wholly improper conduct by Plaintiffs' Counsel, and their request for discovery is meritless.

BACKGROUND

As set forth in the Teva Defendants' Opposition to Plaintiffs' Counsel's Emergency Motion, the law allows defendants to engage in settlement discussions with absent class members. Plaintiffs' Counsel provided *no evidence* of improper conduct by Teva, despite

admitting they discussed Teva's communications with one of the companies Teva had contacted. After receiving Teva's Opposition, Plaintiffs' Counsel served unauthorized, untimely, and inappropriate discovery requests. Those requests included: (i) a subpoena commanding the deposition of Teva employee Christopher Doerr approximately 36 hours after service; (ii) 30(b)(6) notices to each of the individual Teva Defendants (Teva, Barr, and Cephalon); and (iii) document requests. All purported to seek information regarding the lawful and confidential settlement negotiations between the Teva Defendants and any absent class members. The plain purpose of this discovery is to thwart Teva's legally permissible settlement efforts.

ARGUMENT

Discovery is closed, and plaintiffs have not shown good cause why the discovery they seek should be allowed. As an initial matter, the discovery is unnecessary because no factual dispute has been presented by Plaintiffs' Counsel's motion ("Discovery Mot."). Despite the fact the Teva Defendants pointed out this deficiency in response to their first "emergency" motion, Plaintiffs' Counsel have not even made any attempt to cure that deficiency. Even accepting their unsupported assertions, the Teva Defendants have not engaged in any improper conduct *as a matter of law*. *See* Teva Defendants' Opposition to Plaintiffs' Counsel's "Emergency" Motion to Prevent Legally Permissible Client Communications (March 6, 2015) ("Opp'n"). In any event, the discovery sought is also irrelevant, legally unsupported, otherwise available to Plaintiffs' Counsel, and an improper intrusion on confidential settlement communications.

I. THE DISCOVERY SOUGHT BY PLAINTIFFS IS IRRELEVANT.

There is no basis for permitting the extraordinary discovery Plaintiffs' Counsel now seek, particularly where, as here, Plaintiffs' Counsel have made no threshold showing of impropriety. The law permits defendants to contact absent members to discus settlement. *See, e.g.,* Opp'n at 2-4; *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"); *Newberg on Class Actions* § 9:7 (5th ed. 2014) ("[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 within the Third Circuit have specifically recognized the right of defendants to attempt to settle individual claims with absent class members. *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 (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).

Given these authorities, Plaintiffs' Counsel have not their burden of demonstrating that Teva's settlement effort is improper or that there is any justification for the sweeping discovery they seeking into Teva's legally permissible communications with absent class members.

II. THERE IS NO LEGAL BASIS FOR SUCH DISCOVERY.

Plaintiffs' Counsel have cited no applicable precedent supporting their unprecedented request to discover lawful and confidential communications between the Teva Defendants and absent class members. The only two cases on which Plaintiffs' Counsel rely are completely inapposite. Their first case —*Kleiner v. First Nat'l Bank*, 751 F.2d 1193(11th Cir. 1985) — has *nothing* to do with discovery. As discussed in the Teva Defendants' Opposition, in *Kleiner*, 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 two court orders that had limited its communications with class members by undertaking a telephone

campaign asking over 3,000 class members to opt out. Nor did *Kleiner* involve settlement negotiations—the defendant in *Kleiner* was improperly seeking to have the members of the certified class "withdraw" completely with no settlement payment. But despite the defendant's disregard for court orders, *no discovery* of such communications was ordered (or even referenced) in *Kleiner*.

Plaintiffs' Counsel's second case is similarly irrelevant and merely stands for the proposition that depositions can be reopened when the deponent failed to comply with a subpoena and subsequently produced documents raised new issues. *Sentry Ins. v. Brand Mgmt. Inc.*, No. 10-CV-347 ENV, 2012 WL 3288178 (E.D.N.Y. Aug. 10, 2012) (Mot. at 3 n.7). The case has nothing to do with with contacts with class members at all—let alone a request to depose defendants about their contacts with absent class members.

There is good reason why Plaintiffs' Counsel do not cite a single case supporting their request for discovery here: there is clear precedent *against* such discovery. In *The Kay Co., LLC v. Equitable Prod. Co.*, 246 F.R.D. 260 (S.D. W.Va. 2007), the court held:

> The plaintiffs additionally, request that the court grant discovery concerning the subject matter and content of the communications between the defendants and the putative class members and an evidentiary hearing subsequent to discovery. The plaintiffs allege that they cannot know whether the defendants' contacts are abusive unless they are made aware of the subject matter and content of those communications. Just as the defendants are free to communicate with putative class members, so may the plaintiffs engage putative class members in communications about the defendants' contacts absent a discovery order issued by this court. Should the plaintiffs discover that defendants' communication with putative class members was abusive, a limiting order may become necessary. Therefore, the plaintiffs' request for discovery and an evidentiary hearing is **DENIED.**

Id. at 264. As Defendants' Opposition and Plaintiffs' Counsel's subsequent motions make clear, Plaintiffs' Counsel have no evidence of misconduct. Courts deny discovery requests in these

situations. *See, e.g., Bobryk v. Durand Glass Mfg. Co.*, No. 12-CV-5360 NLH/JS, 2013 WL 5574504, at *4 (D.N.J. Oct. 9, 2013) (denying motion for discovery relating to pre-certification discussions because no evidence showed misconduct in employer-employee interviews); *Brown v. Mustang Sally's Spirits & Grill, Inc.*, No. 12-CV-529S, 2012 WL 4764585, at *1 (W.D.N.Y. Oct. 5, 2012) (denying request to "order expedited discovery regarding defendants' communications with putative or current class members," in employee-employer case); *Wu v. Pearson Educ. Inc.*, No. 09 CIV. 6557 RJH JCF, 2011 WL 2314778, at *1 (S.D.N.Y. June 7, 2011) (denying request to compel defendant "to produce all communications it has had with class members"); *Jones v. Nat'l Council of Young Men's Christian Assocs.of U.S.*, No. 09 C 6437, 2011 WL 1312162, at *5–7 (N.D. Ill. Mar. 31, 2011) (denying plaintiff's motion to order discovery regarding defendant's pre-certification settlement communications in employee-employer case with absent class members); *In re M.L. Stern Overtime Litig.*, 250 F.R.D. 492, 494–97, 501 (S.D. Cal. 2008) (denying motion for discovery of all communications regarding pre-certification settlements with absent class members). Plaintiffs' request puts the proverbial cart before the horse by asking this Court to re-open fact discovery, require expedited depositions and document production, and hold an evidentiary hearing so that Plaintiffs can *find out* whether there have been abusive communications.

In fact, 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). In short, parties simply have no obligation to discuss with whom they are negotiating, or the status or terms of those negotiations, before a class is certified.

Despite two chances, Plaintiffs' Counsel have submitted no evidence of improper conduct, as is their burden. Their strategy is to disrupt legitimate settlement discussions through baseless discovery. This is improper. The Court should deny the request for discovery.

III. THE INFORMATION SOUGHT IS OTHERWISE AVAILABLE.

The many cases cited above clearly establish that Plaintiffs' Counsel have no right to any relief, including discovery, unless they first meet their burden of providing evidence of improper conduct. And there is good reason for this threshold requirement. After all, Plaintiffs' Counsel have long known precisely who these absent class members are. Indeed, their motion for class certification repeatedly asserts that the members of the putative class are readily identifiable. (*See* Direct Purchaser Class Certification Motion at 11 n. 57; 13 n. 68 (May 12, 2014).) Nothing prevents Plaintiffs' Counsel from communicating with absent class members directly. In fact, Plaintiffs' Counsel have done just that with the class member from whom they state they learned of the Teva Defendants' settlement offers. (Discovery Mot. at 2.)

In fact, Plaintiffs' Counsel specifically state in their motion to compel discovery that they are fully "aware" of Mr. Doerr's communications. (*Id.*). If Plaintiffs' Counsel wish to communicate "their side of the story" to any absent class members, they are free to do so, and no discovery from the Teva Defendants is necessary or warranted. *The Kay Co.*, 246 F.R.D. at 264 ("Just as the defendants are free to communicate with putative class members, ***so may the plaintiffs engage putative class members in communications about the defendants' contacts*** absent a discovery order issued by this court.") (emphasis added).

IV. DEFENDANTS' SETTLEMENT COMMUNICATIONS ARE CONFIDENTIAL.

In a desperate attempt to justify their over-reaching discovery requests, Plaintiffs' Counsel attempt to cloak these settlement discussions in sinister garb by describing them as "in

secret and by phone." (Discovery Mot. at 2.) Plaintiffs' Counsel's innuendo is misguided. If the description "secret" communications means the discussions were without counsel or that they were confidential (or both), then the observation is hardly surprising and immaterial nonetheless.

First, it smacks of obvious desperation. "Secret" means only that the discussions did not include Plaintiffs' Counsel. And it should come as no surprise that in this day and age people can and do communicate by telephone.

Second, it is beyond dispute that a defendant employee such as Mr. Doerr is permitted to contact a class member without the participation of counsel. It is well-settled that even where two parties are represented by counsel, those parties may still communicate with each other directly, and do not have to go through counsel. *See American Bar Assoc*, Formal Opinion 11-461 at 1 (Aug. 4, 2011) ("It sometimes is desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel").

Third, to the extent Plaintiffs' Counsel's real objection is that the discussions were confidential, their complaint is with the law. For good reason, settlement negotiations are routinely treated as confidential. In fact, Federal Rule of Evidence 408 explicitly contemplates that such communications may be undertaken in confidence and should be protected. Its limitation on the use of settlement discussions "furthers the public policy in favor of maintaining the confidentiality of settlement of disputes by generally requiring confidentiality of compromise negotiations in order to encourage full and open dialogue between the parties." *Blodgett v. Allstate Ins. Co.,* 2:11–CV–02408–MCE, 2012 WL 2377031, at *5 (E.D. Cal. June 22, 2012) (citing *United States v. Contra Costa County Water Dist.,* 678 F.2d 90, 92 (9th Cir. 1982)).

As the Sixth Circuit observed in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003):

> There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications.

Id. at 980. The *Goodyear* court also stated that "confidential settlement communications are a tradition in this country" and that "[t]his Court has always recognized the need for, and the constitutionality of, secrecy in settlement proceedings." *Id. See also Palmieri v. New York,* 779 F.2d 861, 865 (2d Cir.1985) (stating that "[s]ecrecy of settlement terms ... is a well-established American litigation practice").

Allowing Plaintiffs' Counsel to depose Mr. Doerr regarding his settlement discussions would abrogate these fundamental policies, and, just as Plaintiffs' Counsel intend, have a chilling effect on settlement efforts. *See Burlington Northern & Santa Fe Ry. Co. v. Han*, 2015 WL 401744, at *5 (N.D. Okla. Jan. 28, 2015) ("allowing deposition of the persons who negotiated a settlement . . . would generally breach public policies regarding the confidentiality of settlement negotiations" and discourage settlements). The Court should deny Plaintiffs' Counsel's attempt to use baseless discovery requests to thwart lawful and confidential settlement discussions.

CONCLUSION

For these reasons, Defendants respectfully submit that the Court should deny Plaintiffs' Counsel's "emergency" motion for unprecedented settlement negotiation discovery and grant a protective order against all discovery requests (including witness subpoena) they have served.

Dated: March 11, 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
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Date: March 11, 2015