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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CASE NO.: 4:03CV-3-M

EDWARD LEE SUTTON, LESTER H. TURNER,
LINDA JOYCE FORD, TIMOTHY D. MAY,
LADONIA W. WILSON, ROBIN LITTLEPAGE,
ROBERT R. TEAGUE, and TABITHA NANCE
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED PLAINTIFFS

v. **MOTION FOR REMEDIAL MEASURES**

HOPKINS COUNTY, KENTUCKY
AND
JIM LANTRIP INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS JAILER
OF HOPKINS COUNTY, KENTUCKY DEFENDANTS

Come the Defendants, Hopkins County, Kentucky and Jim Lantrip, in his individual and official capacities (hereinafter "Defendants"), by and through the undersigned counsel, and for their Motion for Remedial Measures hereby state as follows:

I. INTRODUCTION

This motion is brought in response to a supplementary notice of class action and accompanying questionnaire which was sent by Plaintiffs' counsel and received by numerous persons, including Donald Corum and Teri Matheny. (Letter attached hereto as Exhibit "A"; Affidavits of Corum and Matheny, attached hereto as Exhibits "B" and "C", respectively). This notice, which was in the form of a letter on Plaintiffs' counsel's letterhead (hereinafter the "letter"), was sent on April 14, 2006. Said letter was not disclosed to Defendants nor approved by this Court.

In this letter, Plaintiffs' counsel explains the nature of the action and subclasses

involved, notes that the recipient did not respond to a previous notice and again invites the recipient to join the class. Furthermore, Plaintiffs' counsel fabricated a new definition for the term "strip-search" which is certain to mislead many recipients to believe that they have a claim when they truly do not.

Despite this Court's official sanctioning of the definition of the term "strip-search" for purposes of this action, and without the support of any judicial precedent, Plaintiffs' counsel elected to redefine a "strip-search" as "a search in which you were required to remove *all or part* of your clothing by a jail officer so that he/she could conduct a visual examination of *all or part* of your body." This letter was clearly a misleading attempt to entice prospective class members to join the action even though they had not truly been strip-searched at the Hopkins County jail.

Such conduct is potentially an ethical violation and is certainly a violation of the spirit and express language of Rule 23. Accordingly, Defendants are entitled to remedial measures at the expense of Plaintiffs' counsel and an order prohibiting further contact between Plaintiffs' counsel and prospective class members without prior Court approval.

II. DISCUSSION

A. THE PRESENT SOLICITATION LETTER PREJUDICES THE ENTIRE ACTION BY TAINTING THE MINDS OF PROSPECTIVE CLASS MEMBERS AND PREVENTING THEIR INDEPENDENT ANALYSIS OF THE ACTION.

"Courts are concerned during the period after certification but before the expiration of the exclusion period with the possibility of solicitation or champerty by the attorneys for the class representative…" 5 Newberg on Class Actions § 15:15 (Thompson/West 2006)(internal citations omitted).

An illustration of the reasons for such concern can be found in ***Impervious Paint***

Industries, Inc. v. Ashland Oil.[1] Although the court in ***Impervious*** was adjudicating the propriety of contacts initiated by a *defendant*, the court did set forth rules governing plaintiffs' counsels relating to contact with potential class members. Regarding the time between the institution of the class action and the close of the exclusion period, the court provided that "*for the purposes of the obligation to avoid unethical solicitation, class counsel must treat the class members as non-clients.*" ***Id.*** at 722. Accordingly, the court held that "it would also appear that contact initiated by class counsel prior to the close of the opt-out period would be unethical as direct solicitation of clients, if the purpose or predictable effect of the contact is to discourage a decision to opt out of the class." ***Id.***

The court spoke to the rationale for the above holding when it recognized that "[i]t is essential that the class members' decision to participate or to withdraw be made on the basis of independent analysis of its own self-interest. It is the responsibility of the Court as a neutral arbiter, and of the attorneys in their adversary capacity, to insure this type of free and unfettered decision." ***Id.*** at 723. The court further noted that "[t]he mechanism selected for accomplishing this is the class notice, which is designed to present the relevant facts in an unbiased format." ***Id.***

It is without question that the potential class members so contacted have had their decision making process tainted by the persuasive and biased nature of the letter. The letter is clearly in contravention to the spirit of Rule 23(b)(3) which requires that potential class members make their decision to participate based upon an independent analysis of their own self interest. Plaintiffs' counsel's conduct has clearly prejudiced Defendants in that it renders a free and unfettered decision as to the participation of putative class

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[1] 508 F.Supp. 720 (W.D. Ky. 1981).

members all but impossible.

B. THE SOLICITATION LETTER VIOLATES NOT ONLY THE SPIRIT OF RULE 23(b)(3) BUT ALSO THE EXPRESS PROVISIONS OF RULE 23 REGARDING THE DISSEMINATION OF NOTICE.

Fed. R. Civ.P. 23(c)(2)(B) provides that "[f]or any class certified under Rule 23(b)(3), *the court must direct* to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." (emphasis added). Leading authorities in the field recognize the mandatory nature of the courts obligation by noting that "Rule 23 makes clear that the district court has a key role in the provision of notice, mandating that *the court* shall direct the appropriate notice to members of the class." McLaughlin on Class Actions at 5-408.(emphasis in original).

"The district court has an affirmative obligation in its capacity as fiduciary for absent class members to review the proposed notice to ensure that it meets the requirements of due process." ***Id.*** at 5-409; *citing* ***Schisler v. Hecker***, 787 F.2d 76, 86 (2d Cir. 1986)("[T]he district court should examine that notice, and fashion its own more effective notice, if necessary."); ***Macarz v. Transworld Systems, Inc.***, 201 F.R.D. 54, 57 (D. Conn. 2001)("The Court bears the responsibility of directing the best notice practicable to class members and safeguarding them from unauthorized, misleading communications from the parties or their counsel.").

Clearly, it is this Court's place to orchestrate the class notice in such a way as to comport with the requirements of due process and to guard against abuse of the class action by the parties or their counsels by engaging in unauthorized and misleading communications. Needless to say, Plaintiffs' counsel has usurped this Court's function

by sending the most recent letter. Further, Plaintiffs' counsel has called into question his ability to adequately represent the class by engaging in the very behavior that this Court is responsible for guarding against. Such behavior is prejudicial to not only the Defendants, but to the entire action. Accordingly, curative measures are required.

C. DEFENDANTS ARE ENTITLED TO CURATIVE MEASURES AT PLAINTIFFS' COUNSEL'S EXPENSE.

The Manual for Complex Litigation provides that "[i]f class members have received communications containing misinformation or misrepresentations, a curative notice from the court, at the expense of those at fault, may be appropriate." ***Id.*** As to the nature of some other curative measures, the Manual suggests "extending deadlines for opting out, intervening or responding to a proposed settlement, or voiding improperly solicited opt outs." Other sanctions, such as disclosure of information gained in violation of the attorney-client relationship, contempt and fines, assessment of fees, or in an egregious situation, the replacement of counsel or of a class representative, may be justified." ***Id.***

This Court is now faced with the challenge of setting right the frame of mind of potential class members and of dispelling the self-serving misrepresentations contained in Plaintiffs' counsel's solicitation letter. Defendants opine that the prejudice caused can be satisfactorily remedied by a curative notice sent at Plaintiffs' counsel's expense to those persons who have responded to the April, 2006 notice and letter (apparently 200 or so thus far according to Plaintiffs' counsel). Additionally, Defendants request that this Court prohibit any further contact with potential class members by Plaintiffs' counsel without prior court approval.

Furthermore, in light of the prejudice caused to Defendants by Plaintiffs'

counsel's actions, Defendants request that this Court order Plaintiffs' counsel to produce to Defendants all other of the same or similar letters sent to potential class members, as well as any and all records of any kind which relate to other communications, or attempted communications, by Plaintiffs' counsel of potential class members, including any responses received from said class members.[2]

The propriety of the relief sought by Defendants is supported by the holdings of ***Gulf Oil Company v. Bernard***,[3] which provides that an order limiting communications between parties and potential class member is not an unconstitutional prior restraint when such order is carefully drawn to limit speech as little as possible and is based upon 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. However, what makes the injunctive relief sought all the more proper is the fact that it will not act as a prior restraint on speech at all because it is a measure taken in response to improper contacts which *have already occurred*. *See* ***Meek***, 620 N.E.2d at 986.

The argument that the cost of this Court's curative measures must be borne by Plaintiffs' counsel is supported by the fact that such conduct is in violation of the ethics rules. Kentucky Supreme Court Rule 3.130(7.01)(1) provides that " "[a]dvertise" or "advertisement" means to furnish any information or communication containing a lawyer's name or other identifying information…" with the exception of a list of communications enumerated as (a) through (i), none of which apply to the letter by Plaintiffs' counsel. This letter is clearly an attempt to solicit professional employment and constitutes an advertisement. As such, the letter is governed by SCR 7.

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2 This information is simultaneously sought from Plaintiffs via discovery request.

3 452 U.S. 89 (1981).

SCR 3.130(7.07) provides that "[f]or any advertisement on which an advisory opinion has not been sought, the Commission, or its designee, shall review such filings for compliance with the Advertising Rules and Advertising Regulations." It is assumed that Plaintiffs' counsel did not submit the present solicitation letter for review by the Attorneys' Advertising Commission, its designee or any other person or entity. Accordingly, Plaintiffs' counsel's conduct is in violation of SCR 3.130(7.07).

The solicitation further runs afoul of SCR 3.130(7.09)(3) which requires that the communication contain the words "THIS IS AN ADVERTISEMENT" in all capital letters. Such disclosure is to be contained on the "envelope, document or electronic devise in which such communication is transmitted."

WHEREFORE, for the forgoing reasons, defendants herein, Hopkins County, Kentucky and Jim Lantrip, in his individual and official capacities, hereby respectfully request the following relief:

a. That, at the expense of Plaintiffs' counsel, this Court forward an official notice to all potential class members who have sent a questionnaire to Plaintiffs' counsel since April 14, 2006, instructing them as to the true legal definition of a strip-search and other principles to consider in making their determination to participate in the action; and

b. A Court order prohibiting upon further contact of potential class members by Plaintiffs' counsel without prior court approval; and

c. A Court order requiring Plaintiffs' counsel to produce to Defendants all responses received from said class members since April 14, 2006.

Respectfully submitted,

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By: s/ Stacey Blankenship
Stacey A. Blankenship

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on June 15th, 2006, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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on this 15th day of June, 2006

By s/ Stacey Blankenship
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