

COPY

**SUPERIOR COURT OF THE STATE OF GEORGIA
COUNTY OF COBB**

EDGAR "BO" POUNDS, individually and)
on behalf of the estate of Mary Jean Pounds,)
JOSEPH THOMPSON, FRANKLIN)
SMITH, EAGLE EYE FORENSICS, LLC,)
DIANNE BRACKIN, and WILLIAM)
SHARP, Derivatively On Behalf of COBB)
ELECTRIC MEMBERSHIP)
CORPORATION.)

Civil Action File No. 07-1-9408-48

Plaintiffs,

vs.

DWIGHT BROWN, DON BARNETT,)
DAVID MCGINNIS, KAY ANDERSON,)
AL FORTNEY, JR., FRANK BOONE,)
SARAH BROWN, LARRY CHADWICK,)
HENRY BALKCOM III, COBB ENERGY)
MANAGEMENT CORPORATION and)
DOES 1-15, inclusive,)

Defendants,

-and-

COBB ELECTRIC MEMBERSHIP)
CORPORATION, a Georgia Corporation,)

Nominal Defendant.

ORAL ARGUMENT REQUESTED

COBB COUNTY GA.
FILED IN OFFICE
07 NOV 15 PM 1:11
Theresa S. [Signature]

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO LIMIT COERCIVE COMMUNICATIONS**

INTRODUCTION

Plaintiffs respectfully seek an Order requiring Defendants to immediately cease directing communications to members of Cobb EMC and potential jurors for purposes of influencing their opinions as to this litigation and circumventing critical Court oversight and control in this matter. Alternatively, Plaintiffs respectfully request an Order permitting Plaintiffs' counsel, through any reasonable means, to direct communications and opposing viewpoints to these unnamed

CARR & PALMER, LLP, A Limited Liability Partnership

derivative Plaintiffs, including requiring that any mass mailings and advertisements by Defendants to EMC members contain a counter statement provided by Plaintiffs' counsel and *approved by the Court* for simultaneous distribution to the EMC members.

FACTUAL BACKGROUND

On October 19, 2007, Defendant Dwight Brown caused a letter to be sent under his signature to all members of the EMC by mail. That letter is attached hereto as Exhibit 1 and was, on its face, sent for the purpose of communicating with EMC members about the substance of this litigation and to influence their opinions thereon. That communication with the members of the derivative class and potential jurors was inappropriate under well-established law.

On October 26, 2007, Cobb EMC Chairman Larry Chadwick caused the EMC to take out a full page advertisement in the Marietta Daily Journal. That advertisement, attached hereto as Exhibit 2, was also an inappropriate communication with members of the derivative class and potential jurors. While that communication was seemingly an attack on the Atlanta Journal Constitution, it was nevertheless an inappropriate communication for the purpose of influencing members of the derivative class and potential jurors. Significantly, that advertisement also indicates that the Defendants plan to continue this pattern of communications, stating, "we want you to know that there's more to this story and it will be told in the days ahead."

On November 5, 2007, Cobb EMC took out another full page advertisement in the Marietta Daily Journal. That advertisement, attached hereto as Exhibit 3, was also an inappropriate communication with members of the derivative class and potential jurors. That ad expressly deals with, and attempts to influence, litigation matters and circumvent Court oversight.

On November 11, 2007 Cobb EMC again issued a full page advertisement in the Marietta Daily Journal. That advertisement, attached hereto as Exhibit 4, was once again an inappropriate communication with members of the derivative class and potential jurors meant to influence litigation matters and circumvent Court oversight.

ARGUMENT AND CITATION TO LEGAL AUTHORITY

The entry of the requested relief will help maintain the status quo and prevent Defendants from circumventing critical Court oversight and control of communications in this matter.

Courts have recognized that generally a defendant is entitled to communicate with putative class members regarding certain issues such as settlement offers. See Bublitz v. E.I. DuPont De Nemours & Co., 196 F.R.D. 545, 548 (S.D. Iowa 2000); Cox Nuclear Med. v. Gold Cup Coffee Servs., 214 F.R.D. 696, 699 (S.D. Ala. 2003). However, courts have imposed limitations upon a defendant's right to communicate, *even if no abuse is shown*, where the defendant and the putative class members have an ongoing relationship which creates a risk of coercion. For example, the risk of coercion is inherent where the relationship between the defendant and putative class members is that of employer and employees. See Bublitz, 196 F.R.D. at 548 (stating that "[w]here the defendant is the current employer of putative class members who are at-will employees, the risk of coercion is particularly high"); Abdallah v. Coca-Cola Co., 186 F.R.D. 672, 678 (N.D. Ga. 1999) (stating that, although Coca-Cola had not given the court any reason to suspect that it would mislead its employees and coerce them into non-participation, "simple reality suggests that the danger of coercion is real and justifies the imposition of limitations on Coca-Cola's communications with potential class members").¹

¹ Even more so than in Abdallah, because this matter is a derivative action on behalf of all Cobb EMC members, the class is not putative. Rather, it is actual, set and defined from the outset.

An ongoing business relationship between the defendant and putative class members has also been held to create an inherent risk of coercion. In Ralph Oldsmobile, Inc. v. General Motors Corp., No. 99 Civ. 4567 (AGS), 2001 WL 1035132 (S.D.N.Y. Sept. 7, 2001), the court found that the relationship between General Motors dealers and General Motors created “the clear potential for abuse” because the dealers were dependent upon General Motors for their supply of vehicles and “[t]heir continued success and, indeed, existence may depend upon GM’s good will.” Id. at *4; see also Kleiner v. First Nat’l Bank of Atlanta, 751 F.2d 1193, 1202 (11th Cir. 1985) (concluding that the relationship between the defendant bank and the class members was inherently coercive because the “class consisted of Bank borrowers, many of whom were dependent on the Bank for future financing”).

Here, many members of the EMC are employees of Cobb EMC or Cobb Energy just as in Coca-Cola. Additionally, all members of the EMC are *owners and customers* of the EMC who have a *dependent ongoing business relationship* with the EMC for their power, just as in Ralph Oldsmobile and Kleiner. Furthermore, part of the relief sought by Plaintiffs’ complaint includes declaring the election of certain board members a nullity and requesting a new court-monitored election. Thus, just as in Coca-Cola, Ralph Oldsmobile and Kleiner, the pattern of communication Defendants have undertaken here is inappropriate and threatens to affect the Court’s control of this matter.

The U.S. Supreme Court’s decision in Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981), provides guidance as to the analysis that the Court must use in deciding a motion to prohibit communications with prospective class members. The Court indicated that district courts have “both the duty and authority to exercise control over class action[s] and to enter” orders that will serve to curb abuses that may occur in such actions. Id. at 100. However, the Court explained

that a district court must exercise its discretion within the parameters of the Federal Rules. Id. The Gulf Oil court found the district court's order, which prohibited all communications between the parties or their counsel and potential class members without the prior court approval, troublesome because it interfered with the plaintiffs' efforts to inform potential class members of the existence of the lawsuit and made it more difficult for the class representatives to obtain information about the merits of their case. The Court held that the determination of whether an order is proper requires specific findings that balance the interests of the parties:

Because of these potential problems, an order limiting communications between parties and potential class members should 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. . . . In addition, such a weighing — identifying the potential abuses addressed — should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.

Id. at 101-02.

Consequently, and conforming to the guidelines of Gulf Oil, Plaintiffs request the Court enter a very narrowly tailored Order merely limiting the EMC and its officers and directors from publicly communicating with members of the derivative class *about this litigation*. All other business related communications shall not be affected, and are not sought to be affected, by Plaintiffs. This narrowly tailored Order will properly limit abuse and preserve the Court's full control of this matter.

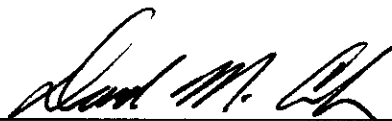
Alternatively, Plaintiffs respectfully request the Court enter an Order permitting Plaintiffs' counsel, through any reasonable means, to direct communications and opposing viewpoints to these unnamed derivative class Plaintiffs. Entry of such an Order also maintains the status quo, limits abuse and preserves the Court's full control of this matter by requiring that

any mass mailings and advertisements by Defendants to EMC members contain a counter statement provided by Plaintiffs' counsel and *approved by the Court* for simultaneous distribution to the EMC members.

CONCLUSION

Plaintiffs respectfully request the Court enter a narrowly tailored Order limiting the EMC and its officers and directors from publicly communicating with members of the derivative class *about this litigation*. Alternatively, Plaintiffs respectfully request the Court enter an Order permitting Plaintiffs' counsel, through any reasonable means, to direct communications and opposing viewpoints to these unnamed derivative class Plaintiffs, including requiring that any mass mailing and advertisements by Defendants to EMC members contain a counter statement provided by Plaintiffs' counsel and approved by the Court.

Respectfully submitted this 12th day of November, 2007.



W. Pitts Carr
Georgia Bar No. 112100
David M. Cohen
Georgia Bar No. 173503
CARR & PALMER, LLP
10 North Parkway Square
4200 Northside Parkway
Atlanta, Georgia 30327
Ph: (404) 442-9000
Fx: (404) 442-9700

DUPREE & KIMBROUGH, LLP
Hylton B. Dupree, Jr.
Georgia Bar No. 234800
49 Green Street
P.O. Box 525
Marietta, Georgia 30061
Ph: (770) 424-7171
Fx: (770) 424-0644

THE WEBB LAW GROUP, LLC

E. Adam Webb
Georgia Bar No. 743910
1900 The Exchange, S.E., Suite 480
Atlanta, Georgia 30339
Ph: (770) 444-0773
Fx: (770) 444-0271

CERTIFICATE OF SERVICE

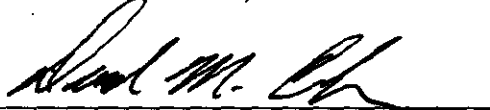
This is to certify that I have this date served a copy of Plaintiffs' Memorandum of Law in Support of Motion to Limit Coercive Communications for upon opposing counsel of record in this matter by depositing same in the United States Mail, First Class postage prepaid, addressed as follows:

Bruce Brown
McKenna, Long and Aldridge
303 Peachtree Street, NE Suite 5300
Atlanta, GA 30308

H. Scott Gregory, Jr.
Brock, Clay, Calhoun & Rogers, P.C.
49 Atlanta Street
Marietta, Georgia 30060

This 12th day of November, 2007.

CARR & PALMER, LLP



W. Pitts Carr
Georgia Bar No. 112100
David M. Cohen
Georgia Bar No. 173503
10 North Parkway Square
4200 Northside Parkway
Atlanta, Georgia 30327
Ph: 404-442-9000
Fax: 404-442-9700