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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **SOUTHERN DIVISION**
14

15 JOYCE WALKER, KIM BRUCE
16 HOWLETT, and MURIEL SPOONER
on behalf of themselves and all others
17 similarly situated,

18 Plaintiffs,

19 vs.

20 LIFE INSURANCE COMPANY OF
THE SOUTHWEST, a Texas
21 corporation, and DOES 1-50,

22 Defendant.

Case No.: 10-09198 JVS(RNBx)

EX PARTE APPLICATION FOR
ENTRY OF ORDER RE: CONTACTS
WITH PUTATIVE CLASS MEMBERS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

Judge James Selna
Courtroom: 10C

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3 **EX PARTE APPLICATION**

4 Pursuant to Fed. R. Civ. Proc. 6(c)(1)(A) and 23(d) and Local Rule 7-19, Life
5 Insurance Company of the Southwest (“LSW”) respectfully files this *ex parte*
6 application for an entry of order regarding contacts with absent members of the putative
7 class.

8 Plaintiffs oppose this motion. On March 5, 2012, Jonathan Shapiro, counsel for
9 LSW attempted to contact Brian Brosnahan, lead counsel for Plaintiffs by telephone.
10 Mr. Brosnahan was unavailable so Mr. Shapiro spoke to Mr. Brosnahan’s associate,
11 Jeanette Barzelay, and orally advised her that LSW would be filing an *ex parte*
12 application for an order governing contacts with absent members of the putative class on
13 March 5, 2012. *See* Declaration of Jonathan Shapiro (“Shapiro Dec.”) ¶ 2.

14 This motion is based on the attached memorandum of points and authorities, the
15 attached Exhibit A (a protective order entered by this Court in *In Re: Toyota Motor*
16 *Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability*
17 *Litigation*), the attached Exhibit B (a blackline comparing the substantive texts of
18 LSW’s proposed order and Exhibit A), the declaration of Jonathan A. Shapiro and
19 exhibits thereto, the pleadings, records and files in this case, and such other matters as
20 may be considered by the Court.

21 DATED: March 5, 2012

22 Respectfully submitted,
23 WILMER CUTLER PICKERING HALE AND
24 DORR LLP

25 By: /s/ Jonathan A. Shapiro
26 Jonathan A. Shapiro (257199)
27 Andrea J. Robinson (*pro hac vice*)
28 Timothy J. Perla (*pro hac vice*)

Attorneys for Defendant Life Insurance Company of
the Southwest

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. Introduction**

4 LSW asks this Court to enter an order governing contacts with absent members of the
5 putative class. LSW's proposed order is identical in almost every respect to the Court's
6 order entered in the *Toyota* multi-district litigation.¹ *Compare* Order, *In re: Toyota Motor*
7 *Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability*
8 *Litigation*, 8:10ML2151 JVS (FMOx) (Dkt. 2200) (C.D. Cal. Feb. 3, 2012) (attached as
9 Exhibit A) *with* LSW's Proposed Order; *see also* Exhibit B (blackline comparing
10 substantive text of two orders). LSW's proposed order differs from the Court's order in
11 *Toyota* in only two substantive respects. *First*, LSW's proposed order prohibits Plaintiffs
12 from contacting minors (children). *Second*, it prohibits Plaintiffs from contacting LSW
13 customers who are not members of the proposed, putative class.

14 This order is necessary because Plaintiffs have already sent letters to LSW
15 customers, using personal identifying information produced by LSW in the course of this
16 litigation. This would not, in itself, be objectionable. But Plaintiffs sent at least one letter to
17 a twelve-year old girl who was not even a member of the proposed class, leaving her
18 mother with the impression that LSW was complicit in the communication.

19 Mistakes happen. Yet Plaintiffs have refused to cooperate with LSW to prevent a
20 similar mistake from happening again. An *ex parte* order is necessary to prevent Plaintiffs
21 from using the threat of improper interference with LSW's business relationships to obtain
22 leverage in this litigation. In the alternative, an *ex parte* order is necessary to maintain the
23 *status quo* until the parties can appear before the Court in a non-chaotic manner.

24 **II. Facts**

25
26 ¹ Per L.R. 7-19: lead opposing counsel is Brian Brosnahan of Kasowitz Benson Torres & Friedman LLP,
27 101 California St., Suite 2300, San Francisco, CA 94111. His phone number is (415) 655-4337. His email
address is bbrosnahan@kasowitz.com.

1 On February 13 or 14, 2012, LSW received a complaint from an policyholder who
2 was upset about a letter sent by Plaintiffs to her twelve-year-old daughter (the insured on
3 her mother's LSW policy). Shapiro Dec., Ex. 2 at 1. The young girl's information was
4 produced by LSW in connection with this lawsuit. *Id.* The application *stated five times that*
5 *she was a "minor"* and her age appeared more than thirty times on other documents in the
6 file produced by LSW. *See id.* The mother was further upset because Plaintiffs' letter had
7 left her with the impression that LSW was somehow complicit in Plaintiffs'
8 communication. *See id.*; Shapiro Dec., Ex. 1 at 1 (copy of Plaintiffs' letter sent to another
9 policyholder) ("We received your name from LSW because, as a purchaser of an LSW
10 EIUL policy after September 24, 2006, you are a member of the proposed class on who
11 behalf the Plaintiffs have brought this case.").

12 Insureds, like the twelve-year-old girl, who did not purchase the policy are not
13 members of the proposed class. *See* Compl. ¶ 64. In this case, the young girl's mother
14 purchased the policy before September 24, 2006, so the mother is not a member of the
15 proposed class either. *See id.*

16 LSW quickly wrote to Plaintiffs, letting them know about the mother's complaint
17 and asking that Plaintiffs refrain from contacting any more of LSW's customers until the
18 parties could reach an agreement to ensure that this error was not repeated. *See* Shapiro
19 Dec., Ex. 1 at 4.² On February 21, 2012, Plaintiffs responded. *See* Shapiro Dec., Ex. 4.
20 Plaintiffs acknowledged that they had sent a letter to a minor who was not the policy
21 purchaser and whose policy was, in any event, outside the class period. *See id.* at 2. But
22 Plaintiffs did not apologize or offer a solution to prevent this inappropriate contact from
23

24
25
26 ² LSW has made its own mistake (accidentally sending bulk mail to an adult, who is a represented party),
27 for which LSW has apologized profusely. *See* Shapiro Dec., Ex. 3 at 1. This only serves to underline the
need for some Court oversight of bulk mailings to individuals and children.

1 being repeated—they blamed LSW for their counsel’s decision to write to the child. *See id.*
2 (“Our letter was apparently sent to the ... family based on an error by LSW[.]”).³

3 LSW replied on February 28, explaining that the parties’ joint stipulation required
4 LSW to produce a sample of “all Paragon or Provider universal life insurance policies
5 issued in California” and not merely a sample of files from policies issued within the class
6 period. *See Revised Joint Stipulation Regarding Plaintiffs’ Motion to Compel Production of*
7 *Documents*, Sept. 13, 2011 (“Joint Stipulation”), Dkt. 100 at 2 (emphasis added); Shapiro
8 Dec. Ex. 5 at 2. In its letter, LSW attached a copy of the Court’s order in *Toyota* regarding
9 contacts with absent class members and asked whether Plaintiffs would agree to the entry
10 of a similar order, subject to the revision that “no children (people under the age of 18) will
11 be contacted under any set of circumstances, nor will Plaintiffs contact anyone who is not
12 even hypothetically a member of your proposed class[.]” *See id.* at 1-2.

13 On March 2, Plaintiffs responded. Plaintiffs refused to agree to LSW’s proposed
14 order unless (i) LSW would agree to exempt Plaintiffs from complying with the Order with
15 respect to the 400+ persons to whom Plaintiffs had already sent their original letter
16 requesting assistance and information; and (ii) LSW agreed to send an inaccurate and
17 unnecessary “corrective” notice⁴ to policyholders who had received an earlier mailing from
18 LSW and. *See Shapiro Dec.*, Ex. 6 at 4 (“Plaintiffs are willing to agree to entry of an order
19 along the lines of the *Toyota* order if LSW complies with the requests set forth in this
20 letter...”) (enclosing “corrective notice” described as “imperative that LSW send”).⁵ Yet
21 Plaintiffs offered no legitimate reason that they might have to contact children or LSW
22

23 ³ Plaintiffs’ only proposed remedy was to send *another* letter to minors, explaining that the original letter
was intended for the policies’ purchasers. *See id.* at 5.

24 ⁴ A copy of the letter to which Plaintiffs object is attached as Shapiro Dec., Ex. 8. As the Court will see,
the substance of the letter is unobjectionable. Obviously, it should not have been sent to Mr. Howlett and
LSW has apologized repeatedly for that mistake.

25 ⁵ If the Court does not believe that a toll-free number is warranted in this case, then LSW has no objection
to Plaintiffs’ suggestion that the toll-free-number provision be omitted. *See Shapiro Dec.*, Ex. 6 at 4. LSW
26 does not agree, however, with Plaintiffs’ suggestion that they should be exempt from the order when
communicating with individuals who are responding to Plaintiffs’ first letter. Having already once
27 suggested that LSW was complicit in turning over its customers’ information, Plaintiffs should be required
to set the record straight if they talk to these people again.

1 customers who are not even hypothetically members of their proposed class. *See id.* Their
2 unreasonable refusal to agree to these basic limits is an unsubtle attempt to bully LSW by
3 threatening its business relationships. That attempt should not be rewarded.

4 On March 5, 2012, LSW responded to Plaintiffs' letter and orally advised Plaintiffs'
5 counsel that LSW would be filing this application today. *See Shapiro Dec., Ex.*

6 **III. Argument**

7 Under Fed R. Civ. Proc. 23(d) the Court may regulate communications with absent
8 members of the putative class to protect them from undue interference. *See In re McKesson*
9 *HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1242 (N.D. Cal. 2000). That order must be
10 based "on a clear record and specific findings that reflect a weighing of the need for a
11 limitation and the potential interference with the rights of the parties." *Id.* (quoting *Gulf Oil*
12 *Co. v. Bernard*, 452 U.S. 89, 101 (1981)).

13 As set forth above, Plaintiffs have contacted at least one child of an LSW customer
14 —whose policy is not even with the class period—and implied that LSW was complicit in
15 that communication. Their failure to cooperate in reaching a reasonable agreement to
16 prevent a reoccurrence of this inappropriate contact creates a significant risk of interference
17 with LSW's business relationships with its customers. Moreover, Plaintiffs'
18 communications with putative class members included misleading statements that would
19 lead putative class members to believe that Plaintiffs' counsel are their attorneys when, in
20 fact, no class has been certified and no attorney-client relationship exists. *See Shapiro Dec.,*
21 *Ex. 1 at 1; Parks v. Eastwood Ins. Services, Inc.*, 235 F.Supp.2d 1082, 1084 (C.D. Cal.
22 2002) (noting that "The Second Circuit, state and federal district courts in California, and a
23 leading treatise" all conclude that "no attorney-client relationship yet exists" prior to
24 certification).⁶

25
26 ⁶ Plaintiffs have suggested that they believe that LSW's own letter to policyholders was misleading.
27 Suffice it to say, LSW's letter was entirely appropriate. In any event, the shared dispute over the
information being conveyed by both parties simply confirms the need for a mutual, court-approved
procedure to govern these communications.

1 The order entered by this Court in *Toyota* imposed reasonable, non-prejudicial limits.
2 It is in accord with the decisions of other courts. In *Gottstein v. National Ass'n for the Self*
3 *Employed*, for example, the court required Plaintiffs' counsel to include the following,
4 similar script in each communication (written or oral) with putative class members:

5 BY ORDER OF THE DISTRICT COURT, I REMIND YOU THAT THE
6 ALLEGATIONS OF PLAINTIFFS ARE, TO DATE, JUST THAT—
7 ALLEGATIONS. THEY HAVE NOT BEEN PROVEN IN A COURT OF LAW. IN
8 ADDITION THE COURT HAS NOT YET APPROVED THIS ACTION TO
9 PROCEED AS A CLASS ACTION. DEFENDANTS, FURTHERMORE,
10 PRODUCED CONFIDENTIAL INFORMATION OF THEIR POLICYHOLDERS
IN CONNECTION WITH THIS LITIGATION AND FOR NO IMPROPER OR
UNETHICAL PURPOSE.

11 186 F.R.D. 654, 659 (D. Kan. 1999).

12 As recognized in *Toyota* and *Gottstein*, Plaintiffs should be required to explain that
13 LSW was required to produce policyholders' information because of this lawsuit.
14 Moreover, Plaintiffs have no legitimate reason to contact minors or non-class-members.
15 The only possible effect of further communications by Plaintiffs with children or non-class
16 members would be to harm LSW's business relationships with its customers. As the court
17 held in *Jackson v. Motel 6 Multipurpose, Inc.*, plaintiffs should not be permitted to use
18 inappropriate pre-certification communications "to coerce defendants into settlement." 130
19 F.3d 999, 1004 (11th Cir. 1997).

20 **III. CONCLUSION**

21 For all the foregoing reasons, LSW asks that this Court enter the attached Proposed
22 Order.

1 Respectfully submitted,

2 WILMER CUTLER PICKERING HALE AND
3 DORR LLP

4
5 By: /s/ Jonathan A. Shapiro
6 Jonathan A. Shapiro (257199)
7 Andrea J. Robinson (*pro hac vice*)
8 Timothy J. Perla (*pro hac vice*)

9 Attorneys for Defendant Life Insurance Company of
10 the Southwest

1 **PROOF OF SERVICE**

2 I am a resident of the State of California, over the age of eighteen years, and not a
3 party to the within action. My business address is Wilmer Cutler Pickering Hale and Dorr
4 LLP, 950 Page Mill Road, Palo Alto, CA 94304. On March 5, 2012 I served the within
5 document(s):

6 LSW'S EX PARTE APPLICATION FOR ENTRY OF ORDER RE:
7 CONTACTS WITH PUTATIVE CLASS MEMBERS;
8 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
9 THEREOF; DECLARATION OF JONATHAN SHAPIRO

10 I placed the document(s) listed above in a sealed envelope with postage
11 thereon fully prepaid, in the United States mail at Palo Alto, CA
12 addressed as set forth below.

13 I personally caused to be emailed the document(s) listed above to the
14 person(s) at the address(es) set forth below.



16 By transmitting via facsimile the document(s) listed above to the
17 facsimile numbers set forth below.



19 I electronically filed the document(s) listed above via the CM/ECF
20 system.

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29 /s/ Jonathan A. Shapiro

30 Jonathan A. Shapiro