BEFORE THE AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT AND CLASS ACTION TRIBUNAL

LARYSSA JOCK, CHRISTY MEIERDIERCKS, MARIA HOUSE, DENISE MADDOX, LISA McCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA MURPHY, DAWN SOUTO-COONS, and MARIE WOLF, individually and on behalf of all others similarly situated,	:	AAA CASE NO. 11 20 0800 0655
Claimants,	:	Arbitrator: Kathleen A. Roberts
-against-	:	
STERLING JEWELERS INC.,	:	
Respondent.	:	

ORDER RE RESPONDENT'S COMMUNICATIONS WITH CLASS MEMBERS

This Order addresses Claimants' Emergency Motion to Restrict Communications with the Certified Class and for Corrective Notice.

On February 2, 2015, I issued a Class Determination Award ("Award") that addressed Claimants' class certification motion for pay and promotion claims under Title VII and the Equal Pay Act ("EPA"). The Award described in detail the disparate treatment and disparate impact claims sought to be certified pursuant to Title VII and analyzed the evidence and expert witness testimony provided in support of and in opposition to these claims. The Award certified a class of current and former female Sterling employees with respect to pay and promotion claims under Claimants' disparate impact theory, but declined to certify claims pursuant to Claimants' disparate treatment theory. The Award also denied certification of the Claimants' EPA claims as an opt-out class, but invited Claimants to file a motion seeking certification of the EPA claims as an opt-in class pursuant to Section 216(b) of the Fair Labor Standards Act. The Award requests

that the parties submit a proposed form of opt-out notice consistent with the Award pursuant to AAA Supplementary Rules 5 and 6. The Arbitrator has not yet received a proposed opt-out notice; accordingly members of the certified class have not received notice of the Award from the Arbitrator, and the opt-out period has not commenced.

On February 3, Sterling sent an email to all of its employees, including members of the certified class, containing a memorandum entitled "Legal Update: Arbitrator Finds No Convincing Proof of Companywide Discriminatory Pay and Promotions Policies at Sterling" (Sterling Memorandum) (annexed to this Order as Exhibit 1).

Claimants contend that Sterling's unilateral communication with class members is prohibited by the rules of professional responsibility, that the Sterling Memorandum is biased and misleading, and that it contravenes the purpose of the Class Notice to be issued by the Arbitrator. Claimants seek an order restricting Sterling's communications with class members and directing Sterling to send a "corrective notice" to all recipients of the Sterling Memorandum.

For the reasons set forth below, Claimants' motion is GRANTED in part and DENIED in part.

APPLICABLE LAW

Rules of Professional Responsibility

It is a well-established rule of professional responsibility that a lawyer shall not communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. See ABA Code of Professional Responsibility, DR 7-104(A); ABA Model Rule 4.2.

The application of this so-called "anti-contact" rule in the context of class actions has been addressed by a number of courts and commentators.

It is generally recognized that the attorney-client relationship between class members and class counsel is not a traditional relationship. In contrast to the relationship between the representative parties and their lawyers, which is one of private contract, the relationship between class counsel and the members of the class is one of court creation. *Amos v. Board of Directors of City of Milwaukee,* 408 F.Supp. 765, 774-75 (E.D. Wis. 1976), *aff'd sub nom. Armstrong v. Brennan,* 539 F.2d 625 (7th Cir. 1976) (issue not discussed on appeal), *vacated and remanded on other grounds,* 433 U.S. 672 (1977) . Because the relationship between absent class members and class counsel is one of court creation rather than private contract, and because of the nature of class action lawsuits, courts have been required to define the parameters of that relationship during the time between the institution of a class action and the close of the opt-out period.

Courts and commentators agree that the anti-contact rule does not apply pre-certification, except with respect to class representatives. However, the application of the anti-contact rule has proved particularly challenging with respect to the period following certification but before the close of the opt-out period. See H. Newberg, *Newberg on Class Actions* § 15.15 (4th ed. 2002) ("During this exclusion period, the status of class members is particularly amorphous because the putative class may contain members who will reject the class action remedy. This period of limbo ma[kes] the application of [the anti-contact rule] more difficult.").

Claimants contend that the anti-contact rule applies upon certification of a class. This is the majority view. *See, e.g., Fulco v. Cont'l Cablevision, Inc.*, 789 F. Supp. 45, 47 (D. Mass. 1992) (after the class has been certified, defendants' counsel must treat the unnamed class

members as "represented by" class counsel for purposes of DR 7-104); *Kingsepp v. Wesleyan University*, 142 F.R.D. 597, 599 (S.D.N.Y. 1992) (in certifying a class action, the Court confers on absent persons the status of litigants and creates an attorney-client relationship between those persons and a lawyer or group of lawyers found to be adequate under Rule 23(a)(4)); *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986) (communicating with class members in securities action after district court orally certified class violated DR7-104(A)); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1034 (E.D. Wash. 1985) (after class certification defense counsel may not communicate with any class member with respect to matters that are the subject of the litigation without prior consent of class counsel or the court); *Impervious Paint Industries, Inc., v. Ashland Oil*, 508 F .Supp. 720, 722-23 (W.D. KY 1981) (defendants' counsel must treat plaintiff class members as represented by counsel, and must conduct themselves in accordance with both sections of DR 7-104); Manual for Complex Litigation, Fourth (2014), § 21.33 ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel. Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation."); Restatement (Third) of the Law Governing Lawyers §99A, cmt. l ("For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class.").

Sterling argues that the anti-contact rule takes effect only after the expiration of the opt-out period. The sole authority cited by Sterling is ABA Formal Ethics Opinion 07-445 ("A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired. If the

client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation. Therefore, 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.").[1] Sterling accordingly argues that the imposition of any limitations on contact between Sterling attorneys and class members prior to the expiration of the opt-out period must meet the requirements of the Supreme Court's decision in *Gulf Oil Company v. Bernard*, 452 U.S. 89, 100 (1981), discussed below.

Control of Communications with Class Members

Separate and apart from the rules of professional responsibility, it is well-established that "[b]ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil*, 452 U.S. at 100; *see also Erhardt v. Prudential Group Inc.*, 629 F.2d 843, 846 (2d Cir. 1980) ("It is the responsibility of the court * * * to safeguard [class members] from unauthorized, misleading communications from the parties or their counsel."); Fed. R. Civ. P. 23(d).

The *Gulf Oil* Court recognized that misleading communications to class members concerning the litigation pose a serious threat to the fairness of the litigation process, the

[1] This approach was adopted by the court in *Logan v. Hargraves*, No. CS/04-0214, 2006 WL 4101355 (E.D.Wash., October 23, 2006); *see also Resznick v. Am. Dental Ass'n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982), in which the court found that communications between defense counsel and plaintiff class members concerning the litigation were barred by DR7-104. The court stated that "[w]ithout question the unnamed class members, once the class has been certified, are 'represented by' the class counsel," but also stated that "[a]fter a court has certified a case as a class action and the time for exclusions has expired, the attorney for the class representative represents all class members who are otherwise unrepresented by counsel" (quoting *Newberg on Class Actions* §2730(d) at 1220 (1977)). Although it is not clear from the court's opinion, it appears that *Resnick* involved post-opt-out period communications.

adequacy of representation and the administration of justice generally. *Gulf Oil*, 454 U.S. at 101 n.12 (*citing Waldo v Lakeshore Estates, Inc.*, 433 F. Supp. 782, 790-91 (E.D. La. 1977), *appeal dismissed without published opinion*, 579 F.2d 642 (5th Cir. 1978)). At the same time, the *Gulf Oil* Court observed that orders regulating communications between litigants pose a grave threat to first amendment freedom of speech. *Id.* Accordingly, any order limiting communications "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," and must limit speech as little as possible. 454 U.S. at 101-102. The court need not find "actual harm" has occurred because of the communication; the imposition of a restrictive order is authorized "to guard against the '*likelihood* of serious abuses.'" *In re School Asbestos Litigation,* 842 F.2d 671, 683 (3rd Cir. 1988) (*quoting Gulf Oil*, 452 U.S. at 104) (emphasis added by the Third Circuit).

In order to make a free and unfettered decision to participate or withdraw, "it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action." *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1202, 1203 (11th Cir. 1985) ("Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. Damage from misstatements could well be irreparable.") The established mechanism for accomplishing this is the class notice, which is designed to present the relevant facts in an unbiased format.

Following *Gulf Oil*, restrictions on communications with class members have been imposed and upheld by numerous courts. *See e.g.*, *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985); *Stransky v. HealthOne of Denver*, 929 F. Supp. 2d 1100 (D. Colo. 2013); *Romano v. SLS Residential, Inc.*, 253 F.R.D. 292 (S.D.N.Y. 2008); *Belt v. Emcare, Inc.*, 629 F.

Supp. 2d 664 (E.D. Tex. 2003); *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630 (N.D. Tex. 1994); *Tedesco v. Mishkin*, 629 F. Supp. 1474 (S.D.N.Y. 1986). Several of these courts have noted the potential for coercion in unilateral communications by the class opponent where the class and the class opponent are involved in an ongoing business relationship. *Kleiner* 751 F.2d at 1202 (class consisted of bank borrowers, many of whom were dependent on bank for future financing); *see also Belt,* 299 F. Supp. 2d at 668 (E.D. Tex. 2003) (letter sent from employer to employees had "heightened potential for coercion"); *Tedesco,* 629 F. Supp. at 1484 (S.D.N.Y. 1986) (class members who have a continuing investment in enterprises controlled by attorney defendant are "particularly vulnerable" to defendant's communications).

Other courts have declined to impose restrictions on communications with class members or held that restrictions imposed by a trial court failed to meet the "clear record" and "specific findings" requirements of *Gulf Oil*. *See, e.g., Great Rivers Co-op of Southeastern Iowa v. Farmland Industries, Inc.*, 59 F.3d 764 (8th Cir. 1995); *Fengler v. Crouse Health Sys., Inc.*, 634 F. Supp. 2d 257 (N.D.N.Y. 2009); *Gerlach v. Wells Fargo & Co.*, No. 05-CV-0585, 2006 WL 824652 (N.D. Cal. March 28, 2006); *Wiginton v. Ellis*, No. 02-CV-6832, 2003 WL 22232907 (N.D. Ill. September 16, 2003); *Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082 (C.D. Cal. 2002); *Burrell v. Crown Central Petroleum, Inc.*, 176 F.R.D. 239 (E.D. Tex. 1997).

DISCUSSION

I find that under the prevailing case law regarding the application of the rules of professional responsibility in class actions, the members of the certified class are represented by class counsel. Sterling's attorneys are therefore prohibited from contacting class members with respect to the subject of this arbitration without the consent of class counsel or order of the Arbitrator. Communications with class members in the ordinary course of business, unrelated to

the arbitration, remain permitted. Counsel are also permitted to make public statements regarding the arbitration, consistent with the AAA Supplementary Rules..

I further find that the Sterling Memorandum presents a seriously incomplete and misleading description of the Award that diminishes the significance of the Award and could potentially discourage interest and participation in the class arbitration.

First, the title of the Sterling Memorandum improperly and erroneously suggests that the Award contains a determination by the Arbitrator *on the merits* that Sterling has not engaged in intentional discrimination. In fact, as Sterling well knows, the Award is limited to a finding that Claimants failed to present sufficient proof of a general policy of pay and promotion discrimination to permit certification of a class with respect to their claim of disparate treatment under the standards set forth in *Wal-Mart*. The Named Claimants and other current and former employees remain free to pursue individual claims of intentional discrimination.

Second, the Sterling Memorandum fails to convey the central determination of the Award: the certification of a class of tens of thousands of current and former female employees with respect to claims of discrimination based upon disparate impact. Indeed, the Sterling Memorandum wholly omits *any* reference to class certification. Rather, the Sterling Memorandum misleadingly suggests that the claims of discrimination in this arbitration are being pursued by a "small group" of "private" claimants.

Third, the Sterling Memorandum minimizes the significance of the Award by presenting a misleading description of the claim of disparate impact, which is described as involving "the very limited question of whether certain Sterling policies had an unintentional impact on female Team Members," and which if proven "may require the company to change the policy or practice

in question." The Sterling Memo fails to mention that class members may also be entitled to an award of back pay.

Fourth, the statement in the Sterling Memorandum that "the arbitrator denied all class-based claims for monetary damages," although literally true, is misleading in that it suggests that class members are precluded from any monetary recovery—even though the Award expressly provides that if Claimants prevail, class members will be entitled to a presumption of entitlement to back pay, to be sought in individual hearings.

Sterling argues that Claimants have failed to establish "the serious actual or threatened misconduct that the law requires to justify the requested severe restraints on free speech and on Sterling's ability to operate its business." Sterling Opposition at 1. Sterling contends that the Sterling Memorandum "was an appropriate communication by a company to *all* of its employees * * * regarding an important development in an ongoing and highly publicized legal proceeding that as had and will have a substantial effect on the company," Sterling Opposition at 3 (emphasis in original), and that the Sterling Memorandum "does not fall on the spectrum of egregious conduct found in the cases * * * where courts have restricted free speech." Sterling Opposition at 9.[2]

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[2] Sterling also argues that "Claimants' proposed restrictions on Sterling's communications with its employees are particularly inappropriate in light of Claimants' media campaign," which Sterling contends includes numerous misrepresentations regarding the Award that "overstat[e] the remaining class claim in the hopes of soliciting more participation by former or current employees." Sterling Opposition at 11. Sterling is free to address the accuracy of Claimants' statements in the public "marketplace of ideas." Claimants' public comments cannot, however, justify misrepresentations by Sterling in internal communications over which it has complete control and where there is no opportunity for rebuttal. *See Shores v. Publix Super Markets*, 1996 U.S. Dist. LEXIS 22396, No. 95-1162-CIV-T-25(E) (M.D. Fla., November 25, 1996).

Sterling observes that in a number of the cases cited above and relied upon by Claimants, defendants intentionally and actively used intimidation, threats, false statements and deception to dissuade potential class members from joining a lawsuit. For example, in *Kleiner*, the defendant and its counsel violated an existing protective order post-certification, but prior to the issuance of class notice, by secretly soliciting exclusion requests from potential members of the plaintiff class by having loan officers call their customers and "do the best selling job they had ever done" to persuade the borrowers to "withdraw from the class." 751 F.2d at 1196-1198. In *Stransky*, the defendant held mandatory staff meetings that the court found to be misleading, coercive and intimidating, at which putative class members were advised that the lawsuit had a low probability of success, and misinformed them regarding the monetary consequences of the outcome, *e.g.*, telling them that if they won, their attorney's fees would be taken out of their award, and if they lost they would be liable for defendant's fees and costs. 929 F. Supp. 2d at 1106. In *Romano*, the defendant health care facility related false and misleading information to putative class members and their families about the consequences of participating in the lawsuit by telling them that their psychiatric records would be made public if they joined the class, and contacted other institutions involved in treating putative class members in an attempt to get institutions to sign opt-outs on behalf of putative class members. 253 F.R.D. at 294-296. In *Belt*, defendants sent a letter just prior to the scheduled mailing of a court-approved notice to putative members of a conditionally-certified collective action (composed of nurse practitioners and physicians assistants), mischaracterizing the suit as an attack on the members' status as "professionals," mischaracterizing available damages, misrepresenting that attorney fees would be deducted from any recovery, and suggesting that the suit could affect members' jobs. 629 F. Supp. 2d at 666-667. In *Hampton*, defendant sent letters to potential class members urging them

not to participate in the lawsuit by pointing out the potential negative impact on the plaintiffs' companies and the costs of litigation "that will ultimately come out of your pocket," and by asserting that "by asking you to join the class, [the lead plaintiff] is asking you to sue yourself." 156 F.R.D. at 631-632. Finally, in *Tedesco*, the defendant authored and sent to plaintiff class members a letter purportedly from a class member encouraging the class members to work together to seek different class counsel and committed perjury when asked about it. 629 F. Supp. at 1479 & n.5, 1482.

Sterling relies on several cases rejecting requested restrictions based upon communications similar to the Sterling Memorandum.

For example, in *Burrell*, the court held that employers have a right to inform employees about pending litigation even when those communications are with potential or actual class members, unless there is evidence of coercion, misleading statements, or efforts to undermine the purposes of Rule 23, *e.g.*, by encouraging putative class members not to participate in the suit. In *Burrell*, the defendant employer sent an email and announcement all employees and held informational meetings at its administrative offices discussing the company's position with respect to a pending class action in which certification had not yet been decided. The court found that the email and announcement, and the slides used at the informational meetings were not misleading and contained no explicit or implicit threats, and that there was no evidence that the company tried to discourage participation in the lawsuit. The court acknowledged that workplace communications are potentially coercive, and that the court need not make a finding that a particular abuse has occurred, but held that a restriction on communications cannot be imposed unless there exists "a clear record of * * * *threatened* abuses." 176 F.R.D. at 244 (emphasis in original).

Similarly, in *Gerlach*, the court rejected a request for restrictions on communications and a corrective notice, which was based upon defendant's allegedly misleading and coercive communications with potential collective action members prior to certification. 2006 WL at 824652. The court found that the document at issue was "not sufficiently misleading or coercive to justify the relief sought," noting that "[i]t informs potential collective action members that it is their decision whether to speak to any lawyer that contacts them and that, if they decide to speak to Plaintiffs' attorneys, they will not be retaliated against. It reiterates that their jobs will not be affected by participating in the lawsuit or by speaking to Plaintiffs' counsel." 2006 WL 824652 at *7 (citation omitted). In addition, the court noted that the document "does not give legal advice, does not suggest retaliation if employees opt in, and does not undermine any notice given by the Court." *Id.* The court further observed that "there is nothing improper about telling potential collective action members, at this point in the litigation, to speak with their manager of an HR representative if they want to learn more about the lawsuit." *Id.*

Sterling also relies upon the decision in *Wiginton*, in which the court denied a motion to restrict defendant's communications with putative class members, based upon its review of two internal e-mails, and its conclusion that they were "not intended to discourage putative class members from participation in this case." 2003 WL 22232907 at *3. Although the court noted its disapproval of defendant's direction to its employees that "they should deny knowledge of the facts of the case to third persons such as friends or clients," the court found that "this does not threaten to undermine the class action process," observing that "there is evidence that this e-mail was sent in response to publicity surrounding the filing of the complaint, not that it was sent to intimidate its employees." *Id.* The second e-mail reiterated the policy that all employees have the right to complain of harassment without fear of retaliation, which the court noted is "similar

to disclaimers ordered by courts that have granted plaintiffs' motions to restrict communications." *Id.* Despite some evidence that a manager had told employees not to speak with plaintiffs' counsel, which was disputed by the manager, the court found that the record did not support a "clear finding of actual or threatened abuses" sufficient to justify the relief sought by plaintiffs. *Id.* at *3-4.

Finally, Sterling relies upon the decision in *Parks*, an FLSA action in which the court granted plaintiffs' motion to designate the case as a representative action and ordered an appropriate notice, but prior to the notice being sent, the defendant sent an internal memorandum regarding the case to prospective plaintiffs, advising them that they could contact defendant's general counsel to answer any questions they might have. The court denied plaintiffs' application to stop defendant from communicating with prospective plaintiffs and to make defendant pay for a corrective notice. The court found that the memorandum did not "undermine or contradict the Court's own notice," that "there is no substantial suggestion of retaliation if an employee opts-in," and that defendant's suggestion to direct questions to general counsel is "permissible" at the "pre-opt in" stage, which the court found comparable to the pre-certification stage of a Rule 23 class action. 235 F. Supp. 2d at 1083, 1085.

None of the above cases presents the precise circumstances of the Sterling Memorandum, which was sent post-certification and pre-Class Notice, and which I find to be misleading as a result of partial truths and significant omissions, but which contains no implicit or explicit suggestion that prospective plaintiffs opt-out of the arbitration (indeed there is no reference to a class proceeding in which current female employees might participate), or suggestion of negative consequences that could result from participation in the arbitration, and is not accompanied by

evidence of any specific conduct by Sterling that threatens to undermine the purposes of a class proceeding.

Applying the principles of *Gulf Oil*, I find that although the Sterling Memorandum is troubling, its misleading partial truths and omissions do not threaten serious abuse of the class arbitration process and therefore do not justify the relief requested by Claimants—particularly because members of the certified class will receive a complete and accurate presentation of the Award in a Class Notice to be approved by the Arbitrator, prior to making any decision with respect to their participation in the class arbitration.[3]

At the same time, I am concerned that formal Class Notice may be delayed as a result of Sterling's pending motion to vacate the Award. In the interim, it is essential that prospective class members receive complete and accurate information regarding the Award. I therefore direct counsel to meet and confer to develop and submit to me no later than March 23, 2015, a document in the form of "Frequently Asked Questions" to be distributed to any potential class member who seeks information from Sterling or from Claimants' counsel regarding the arbitration pending issuance of the Class Notice required by AAA Supplementary Rule 6, which document should also be posted on the AAA website, and which may be updated from time to time to reflect significant developments in the arbitration or court proceedings.

SO ORDERED.

Kathleen A. Roberts

KATHLEEN A. ROBERTS
ARBITRATOR

March 16, 2015

[3] Any actual evidence of efforts by counsel to interfere with the free choice of class members regarding participation in the arbitration should be brought immediately to my attention.