UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

HOLLY LLOYD, *Plaintiff,* *vs.* COVANTA PLYMOUTH RENEWABLE ENERGY, LLC, *Defendant.*	**No. 2:20-cv-4330-HB** [Electronically filed] JUDGE HARVEY BARTLE III **ORAL ARGUMENT REQUESTED**

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO ALLOW *EX PARTE* INTERVIEWS OF PUTATIVE CLASS MEMBERS

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Pursuant to the Court's March 2, 2021 scheduling order (ECF No. 25), Defendant Covanta Plymouth Renewable Energy, LLC ("Covanta Plymouth") moves the Court for confirmation of its right to conduct *ex parte* interviews with potential class members in this putative federal class action, consistent with Fed. R. Civ. P. 23 and the federal work product doctrine, and to do so without prior restraints. Federal procedural law indisputably governs this diversity case and allows counsel to prepare a defense through interview of potential class members because they are not represented parties. Contrary Pennsylvania state law has no bearing on this right provided by federal law.

Nor can any prior restraints be placed on contacts between defendants and putative class members unless there is a likelihood of serious abuse supported by fact findings. Supreme Court precedent dictates that it is Plaintiff's burden to prove that restraints on defense interview rights are required because Covanta Plymouth and its counsel's investigators have abusively contacted residents. Since Covanta Plymouth's counsel has not commenced any outreach to residents, no such evidence exists.

Defense counsel, primarily through a licensed private investigator, intends to interview local residents about their experiences with odors, and will – consistent with standard investigator protocol in litigation – confirm at the outset of each interview that the resident is not represented by counsel in relation to such issues and is willing to be interviewed. Covanta Plymouth's agents should be permitted to proceed with these informal interviews without any prior restraints and without being forced to disclose any attorney work product concerning the strategy for interviews or specific individuals contacted. Defense counsel in a federal civil case have an unassailable right to develop a defense and generate work product by informally communicating with putative class members.

I. Federal law provides that potential class members are not parties and a defendant may informally interview them to prepare its defense.

The question before the Court is not novel, and it is not a close call. Federal procedural law and the large weight of federal court precedent allow *ex parte* interviews of putative class members to enable defense lawyers to investigate and prepare a defense. At least two Supreme Court decisions in the last decade have ratified that a putative class member is not considered a "represented" party while a Rule 23 motion for class certification is pending. *See Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013) ("'a nonnamed class member is [not] a party to the class-action litigation *before the class is certified*'" (italics in original) (quoting *Smith v. Bayer Corp*., 564 U.S. 299, 313 (2011))). Without party status, putative class members in federal court cannot be deemed to be "represented" by the named plaintiff's attorney. The Third Circuit has likewise recognized this for over thirty years. *See In re Community Bank of Northern Virginia*, 418 F.3d 277, 313 (3d Cir. 2005) ("[C]lass counsel do not possess a traditional attorney-client relationship with absent class members."); *In re Sch. Asbestos Litig*., 842 F.2d 671, 679-83 (3d Cir.1988).

Any rules restricting attorney contact with "represented" parties, including Pennsylvania Rule of Professional Conduct 4.2, are thus inapplicable to unnamed members of a putative, federal class. And the Supreme Court has held that district courts cannot restrict parties or their counsel in a class action from communicating with putative federal class members, unless the speech restriction "is justified by a likelihood of serious abuses" and 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." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, 104 (1981).

II. The large predominance of authority supports allowing interviews of the putative class.

Federal courts in Pennsylvania recognize the defense right to interview putative calss members. Only two reported rulings in this district have explicitly restricted interviews of putative class members, both apparently misconstruing a 2001 published opinion of this Court in *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 662-64 (E.D. Pa. 2001). Cases barring interviews are incorrect or misconstrue *Dondore*.

At issue in *Dondore* were two consolidated, individual tort actions filed in federal court alleging that plaintiffs suffered from chronic beryllium disease resulting from exposure to defendants' emissions. *See* 152 F. Supp. 2d at 662-64. Also at issue was a Pennsylvania state class action filed by the same plaintiffs' counsel against the same defendants (but wherein the federal plaintiffs *were not* named). *Id.* As part of their federal defense, defendants identified neighbors and relatives with knowledge about federal plaintiffs' illnesses, and interviewed three of them. Plaintiffs' counsel moved for a state protective order, and defense counsel moved in federal court for permission to continue informal discovery from putative class members. *See id.* Applying Pennsylvania state law, the Court determined that, as it concerned the state class action lawsuit, "putative class members are properly characterized as parties to the action." *Id.* at 666. As a result, the court applied the limitations of Rule 4.2 of the Rules of Professional Conduct to "prohibit[] defense counsel from contacting or interviewing potential witnesses who are putative

class members in [the state class action] without the consent of counsel for the named plaintiffs in that action." *Id.*[1]

Read correctly, *Dondore* does not implicate federal procedural Rule 23 because it did not concern a federal class action. Pennsylvania law dictating the result in *Dondore* – that putative state class members are considered represented parties prior to class certification – is inapplicable to federal class actions which are instead governed by federal procedural Rule 23. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Shady Grove Ortho. Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) (state law, which limited the scope of class actions in contravention of federal Rule 23, was not a federal procedural rule and thus could not be enforced by a federal court under *Erie*); *see also In re Tylenol (Acetaminophen) Mktg., Sales Practices & Products Liab. Litig.*, 2015 WL 7075812, at *10 (E.D. Pa. Nov. 13, 2015) (Stengel, J.) ("[i]n *Shady Grove*, the Supreme Court reaffirmed [that] a Federal Rule of Civil Procedure covering a dispute governs, notwithstanding a contrary state law" (internal citations omitted)). Some courts, however, have misapplied *Dondore* to support the improper imposition of prior restraints on interviews by federal class defendants.[2]

Two years ago Judge Schmehl of this Court correctly read *Dondore* and summarized the applicable law and history in *Weller v. Dollar General*, 5:17-cv-02292-JLS, August 5, 2019

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[1] Notably, in a subsequent unpublished opinion this Court permitted informal, *ex parte* interviews of putative class members in the state class action, but according to a defined protocol. *See Dondore v. NGK Metals Corp.*, 2001 WL 516635, at *2 (E.D. Pa. May 16, 2001).

[2] *See, e.g., Weller v. Dollar General*, 2019 WL 1045960 at *1 (E.D. Pa. Mar. 4, 2019) (Rice, M.J.) (sanctioning defense counsel for conducting informal interviews of putative class members), *reversed by Weller*, 5:17-cv-02292-JLS, August 5, 2019 Order (ECF No. 76) (Schmehl, J.) (distinguishing *Dondore*, and applying federal procedural law) (discussed infra); *Garcia v. Vertical Screen, Inc.*, 387 F. Supp. 3d 598, 601 (E.D. Pa. 2019) (relying entirely on the reversed *Weller* opinion (without analysis) prior to its remand); *Gates v. Rohm and Haas Co.*, 2006 WL 3420591 at *7, n.2 (E.D. Pa. Nov. 22. 2006) (mentioning *Dondore*'s result in passing dicta).

Order (ECF No. 76) (E.D. Pa. August 5, 2019) (the "*Weller* Order") (attached as Ex. A). In that case, plaintiffs made the same argument that Plaintiff made at the status conference on March 2, 2021 – that defense counsel violates Pennsylvania law and ethical rules by communicating independently with putative class members prior to class certification. Magistrate Judge Rice, in a reported decision, had accepted this argument and sanctioned lawyers for conducting interviews. *See Weller v. Dollar General*, 2019 WL 1045960 at *1 (E.D. Pa. Mar. 4, 2019) (Rice, M.J.).

On review, Judge Schmehl reversed this decision in an unreported order. He explained that *Weller* was "venued in federal court, not state court, and therefore federal procedural law must govern." *See Weller* Order at 1, n.1 (emphasis added) (citing *Erie*, 304 U.S. at 78; *Shady Grove Ortho. Assocs., P.A.*, 559 U.S. at 398-99; *In re Tylenol*, 2015 WL 7075812, at *10). Judge Schmehl focused on the critical distinction in federal law: "Under federal law, a putative class member is not considered a represented party while a motion for class certification is pending." *Weller* Order, at 1 n.1 (citing *Standard Fire Ins. Co.*, 568 U.S. at 593; *Bayer Corp.*, 564 U.S. at 313). "Without 'party status,' putative class members in federal court cannot be deemed to be 'represented' by the named plaintiff's attorney." *Id.* (citing *In re Community Bank of Northern Virginia*, 418 F.3d at 313). Accordingly, Pennsylvania's Rule 4.2, barring lawyer communication with represented parties, cannot be used to limit a defendant's contact with putative class members because they are not considered represented parties under federal law.[3]

[3] Pennsylvania state law represents the minority view in holding that putative class members are represented parties prior to certification. *See Bell v. Beneficial Consumer Disc. Co.*, 465 Pa. 225, 231, 348 A.2d 734, 737 (1975) (acknowledging that "our class action rule is somewhat different than its federal counterpart"). *Contra* Restatement (Third) of the Law Governing Lawyers § 99 cmt. l (2000) ("[A]ccording 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; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients."); *see, e.g.*, N.Y.C. Bar Ass'n Formal Op. 2004–01 (Mar. 1, 2004) ("When the

The correct standard is found in the Supreme Court's 1981 *Gulf Oil* decision, which authorizes limiting communications with potential class members only in the rare circumstances "where there is 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." 452 U.S. at 101; *Weller* Order, at 1 n.1. As Judge Schmehl explained, in such instances, "[a] district court has a duty to safeguard class members from unauthorized and misleading communications from the parties and their counsel." *Id.* (quoting *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 541 Fed. Appx. 181, 186 (3d Cir. 2013) (quoting *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 310 (3d Cir. 2005))).

Judge Schmehl's *Weller* Order joins the majority of reported decisions by Pennsylvania federal district courts that have, in one way or another, declined to apply state procedural law to limit putative class member contact in federal collective and class actions. *See, e.g. Arroyo v. Aspen Constr. Servs.*, 2020 WL 4382009 (E.D. Pa. July 31, 2020) (Slomsky, J.) (applying federal standard, declining to limit putative class member contact in FLSA collective action); *Gauzza v. Prospect Med. Holdings, Inc.*, 2018 WL 4853294 (E.D. Pa. Oct. 4, 2018) (Beetlestone, J.) (applying federal standard, declining to limit putative class member contact); *Walney v. SWEPI*, 2017 WL 319801 (W.D. Pa. Jan. 23, 2017) (Conti, C.J.) (distinguishing cases premised upon state law, and applying federal standard in declining to limit putative class member contact); *Becker v. Bank of New York Mellon Tr. Co., N.A.*, 2012 WL 13018242, at *3 (E.D. Pa. Dec. 18,

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lawyer proposing to communicate represents a party opposing a class, the prohibition applies when the class has been certified." (emphasis added)); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-445, at 3 (2007) ("[P]utative 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.").

2012) (Davis, J.) (taking Rule 23 "seriously" and applying federal standard, declining to limit putative class member contact); *Faloney v. Wachovia Bank, N.A.*, 2008 WL 11366235 (E.D. Pa. July 28, 2008) (Rice, M.J.) (predating his opinion in *Weller*, and applying *Gulf Oil* to limit demonstrably abusive contact and avoid reaching *Dondore* issues); *Garcia v. Pilgrim's Pride Corp.*, 2006 WL 1983174 (E.D. Pa. July 13, 2006) (Hart, M.J.) (applying federal standard).[4]

Federal Rule 23 controls all aspects of class certification pleading and certification in this case and thus dictates that putative class members, as unrepresented parties, can be interviewed by defense counsel and their investigators. The Eastern District of Pennsylvania's adoption of Pennsylvania's state ethics rules into its local rules, with the standard prohibition on contacts with represented parties, has no bearing here because as a matter of federal law the putative class members are not represented parties. Counsel for Covanta Plymouth will of course continue to bide by Pennsylvania's ban on communication with "represented" parties by, as is standard practice, have investigators first inquire whether a party is represented before asking any questions.[5]

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[4] *See also Community Bank of Northern Virginia*, 418 F.3d 277 (3d Cir. 2005) ("[C]ourts have recognized that class counsel do not possess a traditional attorney-client relationship with absent class members"); *Velez v. Novartis Pharm. Corp.*, 2010 WL 339098, at *2 (S.D.N.Y. Jan. 26, 2010); *In re Katrina Canal Breaches Consol. Litig.*, 2008 WL 4401970, at *3 (E.D. La. Sept. 22, 2008)("'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.'") (quoting ABA Committee on Ethics & Prof'l Responsibility, Formal Op. 07-445, at 3 (2007)); *The Kay Co., LLC v. Equitable Prod. Co.*, 246 F.R.D. 260 (S.D. W. Va. 2007) (citing ABA Formal Opinion 07-445); 2 McLaughlin on Class Actions § 1:11 (13th ed. 2016) ("The majority rule is that … absent class members are not represented parties prior to class certification and the expiration of any opt-out period.").

[5] The Court's duty is to safeguard class members from unauthorized and misleading communications from parties and their counsel. *See, e.g.*, Weller Order, at 1 n.1 (citations omitted). Here, there are no "unauthorized" or "misleading" communications. Covanta Plymouth is seeking the Court's approval in advance for its communications due to the uncertainty that stemmed from the *Dondore* opinion, which concerned a state class action. Since Covanta Plymouth has not commenced canvassing, there is no basis to allege – let alone prove – that the proposed activity could be "misleading" or "abusive."

III. Covanta Plymouth may canvas witnesses *ex parte* and keep work product including interview notes confidential.

Federal law also provides full work product protection for the witness canvassing Covanta Plymouth's lawyers will undertake. The selection of interview candidates and all witness interview notes by investigators retained by Covanta Plymouth's counsel are shielded from production on work product grounds. The interviews are being prepared in defense of litigation and, for this reason, Plaintiff's suggestion at the March 2 Rule 16 conference that their own agents may accompany Covanta Plymouth's agents – or else otherwise receive any information or data about the canvassing efforts – is at odds with Rule 23 and established protections for attorney work product.[6]

The Third Circuit has long recognized that "[t]he work product doctrine 'is governed, even in diversity cases, by a uniform federal standard embodied in [Federal Rule of Civil Procedure] 26(b)(3).'" *Borgia v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 4375643, at *2 (E.D. Pa. Sept. 3, 2014) (Sanchez, J.) (quoting *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1988) ("Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed. R. Civ. P. 26(b)(3).")); *see also Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C.*, 57 F. App'x 58, 60 (3d Cir. 2003) (same). "Under that standard, a party '[o]rdinarily . . . may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or

[6] In light of the varying rulings on the issues, some litigants in the Eastern District of Pennsylvania have agreed to limiting protocols and limited waivers of work product. For example, Judge Kenney recently entered a limiting order – more restrictive than the Defendant had proposed – imposing onerous obligations to produce information about every individual canvassing contact Defendant makes. *See Baptiste v. Bethlehem*, 18-cv-2691-CK, October 16, 2020 Order (ECF No. 56). Covanta Plymouth does not consent to any waiver of its work product protections.

its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).'" *Borgia*, 2014 WL 4375643, at *2 (quoting Fed. R. Civ. P. 26(b)(3)(A)).

Pennsylvania federal judges have repeatedly recognized that private investigators under the direction of attorneys are fully protected by the work product rule. *See, e.g.*, *R.D. v. Shohola Camp Ground & Resort*, 2018 WL 2364749, at *2 (M.D. Pa. May 24, 2018) (Carlson, M.J.) ("As a general rule, private investigator interviews conducted on behalf of counsel in preparation of litigation are encompassed by the work product privilege. Therefore, disclosure of these interviews typically may not be compelled, provided that the witness is available to be deposed."); *see also Dempsey v. Bucknell Univ.*, 296 F.R.D. 323, 328-29 (M.D. Pa. 2013) (Mehalchick, M.J.) ("Several of the documents at issue here involve notes or memoranda of witness interviews. An attorney's notes or memoranda reflecting his or her recollection or impression of witness interviews constitute opinion work product, regardless of the factual content of the notes or memoranda. This is true also of notes or memoranda prepared by a private investigator or other agent of an attorney." (citations omitted)). Under the federal work product doctrine, Covanta Plymouth is thus entitled to communicate with witnesses privately, and to shield its interviewee selection strategy and notes of those communications from opposing counsel.

IV. Conclusion.

Federal Rule 23 governs this issue, not Pennsylvania rules, and as a matter of federal law, proposed class members are not "represented" parties and may be interviewed. Covanta Plymouth requests the Court publish an opinion and order confirming its rights to canvas residents so that it may begin the necessary logistical preparations for interviews under pandemic conditions and a fact discovery period closing on July 12, 2021.

Dated: March 15, 2021

BY: /s/ *Robert M. Donchez*

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