

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

ROBERT ADAIR, ON BEHALF OF)	
HIMSELF AND ALL OTHERS)	
SIMILARLY SITUATED,)	
)	
Plaintiff,)	Case No. 1:10CV00037
)	
v.)	OPINION AND ORDER
)	
EQT PRODUCTION COMPANY, ET)	By: James P. Jones
AL.,)	United States District Judge
)	
Defendants.)	

David S. Stellings, Steven E. Fineman, Daniel E. Seltz, and Jennifer Gross, Lieff Cabraser Heimann & Bernstein LLP, New York, New York, for Plaintiff; Wade W. Massie and Mark E. Frye, Penn, Stuart, & Eskridge, Abingdon, Virginia, for Defendant EQT Production Company.

In this civil action seeking class certification, the defendant has filed objections to the magistrate judge’s order restricting the defendant’s communication with members of the proposed class. After a careful review of the record, I will sustain the objections and vacate the magistrate judge’s order.

The plaintiff, Robert Adair, has sued defendant EQT Production Company (“EQT”) on behalf of himself and all others similarly situated. This case, along with several others currently before this court, raises issues related to the rights of

owners of coalbed methane (“CBM”), a natural gas extracted from coal seams. Many landowners in Virginia sold their interests in the coal on their property long ago. Ownership of CBM was not then an issue because the gas was seen only as a serious safety risk in coal mining. During the 1970s, however, technological advances enabled the gas to be commercially produced. The question then arose as to whether CBM was owned by the surface landowners or by those who owned the coal estate in the land.

In 1990, the Virginia General Assembly enacted the Virginia Gas and Oil Act (“Gas Act”), Va. Code Ann. §§ 45.1-361.1 to .26 (2002 & Supp. 2011). The Gas Act sought to enable the drilling and production of CBM without waiting until the issue of ownership was decided. It allowed for interests with conflicting claims of ownership to be force-pooled into drilling units. For those drilling units in which there are conflicting claims of ownership of the CBM or where the owners of the CBM are unknown or could not be located, the Gas Act requires the gas well operators to deposit any royalty funds due into escrow. *See* Va. Code Ann. §§ 45.1-361.21, 45.1-361.22. The plaintiff has filed this lawsuit in part to determine the ownership of CBM in Virginia and enable certain CBM owners to gain access to the royalties due them. In his Amended Complaint, the plaintiff defines the proposed class as follows:

Each person and entity who has been identified by EQT Production Company as an “unleased” owner of the gas estate or gas interests in a

tract included in a coalbed methane gas unit operated by EQT Production Company in any of the Subject Virginia Counties, but whose ownership of the coalbed methane gas attributable to that tract has been further identified by EQT Production Company as being in conflict with a person(s) or entity(ies) owning the coal estate or coal interests in the tract, according to filings made by EQT Production Company with the Virginia Gas and Oil Board and/or according to orders entered by the Virginia Gas and Oil Board pursuant to EQT Production Company's filings. The Class excludes (a) the Defendants, and (b) any person who serves as a judge in this civil action and his/her spouse.

(Am. Compl. ¶ 95; *see also* Mem. in Supp. of Pl.'s Mot. for Class Certification 6-7.) The proposed class is thus composed of landowners who have not leased their gas interest to any gas operator and are subject to forced pooling, and who are considered to have unresolved ownership claims. The plaintiff has moved for class certification but his motion has yet to be resolved.

The issue before the court apparently arose when the plaintiff learned that certain landowners had been contacted by EQT regarding their interest and had ultimately entered into "split agreements" with the relevant coal owners. "Split agreements" in this context are agreements between the surface owner and the coal owner of a particular tract to apportion past and future royalty payments.¹

¹ One of the significant questions in this action is the effect of the Virginia Supreme Court opinion in *Harrison-Wyatt, LLC v. Ratliff*, 593 S.E.2d 234 (Va. 2004), and Va. Code Ann. § 45.1-361.21:1 on the question of ownership of CBM as between the surface and coal owners. The plaintiff essentially claims that split agreements between gas interest and coal interest owners are invalid ab initio because *Harrison-Wyatt* and section 45.1-361.21:1 established that coal interest owners have no ownership claim to CBM. The defendant disagrees.

Reaching such an agreement allows the royalty funds to be released from escrow. It would also likely remove those landowners from participation as a member of the proposed class.

The plaintiff filed a Motion to Regulate EQT's Contact with Putative Class Members ("Motion to Regulate"), seeking to prevent EQT from soliciting any split agreements from potential class members pending resolution of the litigation. I referred the motion to the magistrate judge for determination. After briefing from both sides and hearing argument, the magistrate judge entered the present Order under review, restricting EQT's communications with the putative class members. *See Adair v. EQT Prod. Co.*, No. 1:10cv00037, 2011 WL 3273480 (W.D. Va. July 29, 2011) (Sargent, J.). EQT filed timely Objections to the Order pursuant to Federal Rule of Civil Procedure 72(a), which Objections have been fully briefed and are ripe for decision.

II

The magistrate judge based her Order restricting EQT's communications with putative class members on several findings of fact. The parties presented their factual contentions to the magistrate judge via affidavits and exhibits, including letters between EQT or the coal interest owners and the surface owners. The magistrate judge found from the plaintiff's five affidavits that these affiants

had been contacted in the past by a representative of EQT; that such contact took the form of a visit in the home; and that the agents represented to the affiants that the only way they could get their royalty money out of escrow was to execute a split agreement with the coal owner.² *Id.* at *2.

In her analysis, the magistrate judge did acknowledge that “none of the affiants before the court now would qualify as a member of the requested class,” but she concluded that at least one might have been but for executing a split agreement. *Id.* at *3. However, all of EQT’s alleged contacts with that individual, Lehman L. Tiller, took place before this action was filed.

The defendant’s primary evidence was a declaration by Rita McGlothlin-Barrett. McGlothlin-Barrett was an employee of EQT, responsible from 2005 to 2010 for lease acquisitions and regulatory filings and from April 2010 through April 2011 for all land activities in Virginia. McGlothlin-Barrett denied that EQT made any effort to limit the size of the class by obtaining split agreements. In her ruling, the magistrate judge emphasized on McGlothlin-Barrett’s statement that

² The magistrate judge also noted that none of the affiants were informed by EQT of the Virginia Supreme Court’s opinion in *Harrison-Wyatt*. The plaintiff argued that EQT’s failure to inform the affiants of the decision was further evidence of misrepresentation in their communications with putative class members. The magistrate judge concluded that because the effect of *Harrison-Wyatt* is one of the issues presented in this case, she could not find that EQT’s failure to mention it to the affiants was a misrepresentation. *Adair*, 2011 WL 3273480, at *3 n.2. I agree with this conclusion.

“EQT land personnel continued to follow the same practices and procedures they followed before this case was filed.” *Id.* at *2.

McGlothlin-Barrett’s declaration contained more information about EQT’s interactions with gas lessors. The affidavit also stated the following:

EQT is lessee on thousands of gas leases in Virginia. In the course of administering these leases, EQT personnel have had numerous communications with lessors. If lessors inquired about the procedure for obtaining release of royalties from escrow or suspense, EQT would inform its lessors that they could hire an attorney to obtain release of the funds or they could enter into split agreements....

EQT is not currently entering into new leases or drilling new wells in Virginia. In 2010, EQT had approximately 10 employees and 20 contractors working on land matters in Virginia. At present, there are no land employees or contractors here. Land functions in Virginia are being handled out of an office in Kentucky.

(McGlothlin-Barrett Decl. ¶¶ 3, 4.)

From the facts presented, the magistrate judge drew the following conclusions. She determined that EQT agents had been making in home visits to landowners during which they represented that the only way the owners could get their royalty money out of escrow was to sign a split agreement and that by EQT’s own admission, they were continuing in that course of action even after the class action lawsuit was filed. Therefore, the magistrate judge found that “should EQT continue in this conduct, it will likely be contacting putative class members.” *Adair*, 2011 WL 3273480, at *3. She also found that it was “unrefuted” that certain of the communications contained false information in that EQT’s agents

misrepresented that the “only way” to get the money out of escrow was to enter into a split agreement. *Id.*

Based upon this analysis, the magistrate judge determined that there was sufficient evidence for her to regulate EQT’s communications with putative class members. The Order requires that EQT “shall not provide any false information to any putative class members in an effort to obtain split agreements from them. In particular, EQT may not falsely inform putative class members that the only way they can obtain payment of escrowed or future CBM royalties is to enter into a split agreement.” (Order ¶ 1, July 29, 2011.) The Order further states that if EQT does provide any information to a putative class member on how to obtain payment of escrowed royalties or future royalties, “EQT shall inform the putative class member that he may enter into a split agreement or seek a legal determination of ownership from a court and shall inform the putative class member of the fact that this case is pending in this court.” (Id. at ¶ 2.) Finally, the Order requires that all future contact with putative class members by EQT in an effort to obtain split agreements “must be in writing with a copy retained by EQT until final disposition of this action.” (Id. at ¶ 3.)

III

During briefing and argument before the magistrate judge, the parties appeared to assume that the matter was before her as a non-dispositive issue of case management under Federal Rule of Civil Procedure 23(d).³ When a magistrate judge hears and decides a non-dispositive pretrial matter and a party makes a timely objection, the district court must modify or set aside any part of the order that is “clearly erroneous or contrary to law.” 28 U.S.C.A. § 636(b)(1)(B) (2006); Fed. R. Civ. P. 72(a). In its Objections, the defendant contended, for the first time, that the Order was actually an injunction and therefore, beyond the power of the magistrate judge to issue. *See* 28 U.S.C.A. § 636(b)(1)(A) (2006 & Supp. 2011) (stating that a magistrate judge may not determine a “motion for injunctive relief”). A magistrate may hear a motion for injunctive relief but must then submit a report and recommendation to the district judge. 28 U.S.C.A. § 636(b)(1)(B). The district judge then reviews de novo the magistrate judge’s report and recommendation. *Id.* The defendant argues that I should treat the magistrate judge’s Order as a report and recommendation and review it de novo.

I find that the magistrate judge’s Order should be treated as a case management order under the authority of Federal Rule of Civil Procedure 23(d)

³ Rule 23(d) provides the court’s authority to regulate the conduct of the action, including subsection (1)(C) which permits the court to impose conditions on the representative parties or on intervenors. Fed. R. Civ. P. 23(d)(1)(C).

and reviewed for clear error. The seminal case on the issue of regulation of communications with potential class members, *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1991), provides the standards and findings that must be made before a court can regulate communications under Rule 23(d). The *Gulf Oil* Court did not treat the regulation at issue there as an injunction and the standards and findings established are distinct from those for issuing an injunction. See also *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1201 (11th Cir. 1985) (finding that district court's order regulating communication was within the court's "inherent power to manage its cases"); *Wu v. Pearson Educ., Inc.*, Nos. 09 Civ. 6557(RJH)(JCF), 10 Civ. 6537(RJH)(JCF), 2011 WL 2314778, at *5 (S.D.N.Y. June 7, 2011) (holding that although motion was presented as one for preliminary injunction, it was more appropriately treated as a case management order); *Gortat v. Capala Bros., Inc.*, No. 07-CV-3629, 2010 WL 1879922, at *4 (E.D.N.Y. May 10, 2010) (concluding that order in question was more properly characterized as a case management order).

An order is clearly erroneous where, though there may be evidence to support it, the district judge is "left with the definite and firm conviction that a mistake has been committed." *Educ. Credit Mgmt. Corp. v. Mosko (In re Mosko)*, 515 F.3d 319, 324 (4th Cir. 2008) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

IV

The magistrate judge correctly stated the applicable law on communications with putative class members. *Adair*, 2011 WL 3273480, at *2-3. In *Gulf Oil*, the Supreme Court reviewed a district court order that limited communications from class plaintiffs and their counsel to prospective class members in a case dealing with racial and sexual discrimination. The message of *Gulf Oil* is clear. Regulation of communication is appropriate where the purposes of Rule 23 are threatened or undermined. 452 U.S. at 100 (“Because 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.”). However, a court cannot make such a regulation without a clear record showing specific evidence of abuses or threat of abuse. *Id.* at 101 (“[Regulation] 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.”). The moving party must show specifically what is at issue. *Id.* at 102 (“[A court] may not exercise the power [to restrict communications] without a specific record showing by the moving party of the particular abuses by which it is threatened.”) (quoting *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977)). The Court also noted that “the mere possibility of abuses does not justify routine

adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules.” *Id.* at 104.

The test used to determine whether a limitation on communication is necessary is two-pronged. *See Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc.*, 214 F.R.D. 696, 697-98 (S.D. Ala. 2003). The movants must first show that a particular form of communication has occurred or is threatened to occur. *Id.* at 697-98 n.3 (“No matter how abusive a particular communication might be if it occurs, there cannot be a ‘likelihood of serious abuse’ unless there is a likelihood that the feared communication will in fact occur.”).

The movant must then show that the particular form of communication is abusive in that it threatens the proper functioning of the litigation. *Id.* Once the court is satisfied that a particular form of communication is occurring or will occur and that such communication is abusive, then the court determines the narrowest possible relief to protect the rights of those involved. *Gulf Oil*, 452 U.S. at 102. Courts have regulated abusive practices in several broad categories: “communications that coerce prospective class members into excluding themselves from the litigation; communications that contain false, misleading or confusing statements; and communications that undermine cooperation with or confidence in class counsel. *Cox Nuclear Med.*, 214 F.R.D. at 698 (footnotes omitted). The courts generally agree that the movant does not have to show that actual harm did

occur, *see Kay Co., LLC v. Equitable Prod. Co.*, 246 F.R.D. 260, 263 (S.D. W. Va. 2007), but the *Gulf Oil* Court was clear that the “mere possibility” that a certain communication may occur is not sufficient. 452 U.S. at 104.

V

I find that the magistrate judge’s Order is not based on a clear record showing that the particular form of communication at issue has occurred or is threatened to occur with potential class members. The court’s authority to regulate the parties’ communications comes from Rule 23 and is legitimate only to the extent that it “prevent[s] frustration of the policies of Rule 23.” *Gulf Oil*, 452 U.S. at 102 (quoting *Coles*, 560 F.2d at 189). If there was no clear record that the purposes and policies of Rule 23 were threatened, then the magistrate judge did not have the authority to issue the Order. Upon review of the evidence presented, I am left with the “definite and firm conviction that a mistake has been committed.” *See United Mktg. Solutions, Inc. v. Fowler*, No. 1:09-CV-1392-GBL-TCB, 2011 WL 837112, at *2 (E.D. Va. Mar. 2, 2011) (sustaining plaintiff’s objections to magistrate judge’s order on attorney’s fees because defendants failed to submit sufficient evidence to support fee sought).

There is no clear evidence in the present case showing a threat of abusive communications with potential class members. The plaintiff presented no evidence

of EQT contacts with any putative class members and presented only one instance of contact with a non-class member after the filing of the lawsuit. It must be noted that McGlothlin-Barrett's statement that after the present case was filed EQT continued to "follow the same practices and procedures they followed before this case was filed" was a *statement in opposition* to the allegation that EQT was seeking split agreements in a specific attempt to reduce the size of the potential class. (McGlothlin-Barrett Decl. ¶ 2.) EQT stated, in response to the accusation that it had initiated a split agreement campaign post-filing of the class action, that it had not changed any of its practices and procedures specifically in response to the lawsuit. However, when describing EQT's current practices, the declaration by McGlothlin-Barrett stated that EQT is not entering into any new leases or drilling new wells in Virginia and no longer has any land employees in Virginia. (*Id.* ¶ 4.) The evidence thus indicates that there is little or no present threat of the type of communications at issue. Regardless, there was no evidence before the magistrate judge of any contacts with putative class members.

Further, the record is not clear as to the substance of the communications between EQT and the five affiants. The magistrate judge concluded that it was "unrefuted" that certain communications misrepresented that the only way the CBM claimant could obtain payment was by entering into a split agreement. *Adair*, 2011 WL 3273480, at *3. However, the plaintiff's own submissions,

through affidavits and through the exhibits, show that each affiant was informed, in a general sense, of their right to pursue litigation as an alternative to a split agreement. EQT also presented evidence that when it is approached by lessors inquiring about the release of royalties, it is its policy to “inform its lessors that they could hire an attorney to obtain release of the funds or they could enter into split agreements.” (McGlothlin-Barrett Decl. ¶ 3.) This record is simply not sufficiently clear, as required by *Gulf Oil*, to support the Order restricting EQT’s communications.

There is certainly merit to the magistrate judge’s efforts to protect the rights of the potential class members in this litigation. As she recognized, “[i]f potential class members enter into voluntary agreements regarding the ownership of the CBM, they necessarily would give up any right to receive a court determination of this issue through this, or any other, litigation.” *Adair*, 2011 WL 3273480, at *3. If the potential class members enter into those agreements because they are fed misinformation about their rights, then there would be a significant threat to the administration of justice. However, on the present record, those concerns are “mere possibilities” and cannot form the basis for an order restricting communications.

VI

For the forgoing reasons, it is **ORDERED** as follows:

1. Defendant's Objections to the magistrate judge's Order (ECF No. 223) are SUSTAINED;
2. The magistrate judge's Order (ECF No. 221) is VACATED; and
3. Plaintiff's Motion to Regulate Defendant EQT Production Company's Contact with Putative Class Members (ECF No. 201) is DENIED.

ENTER: September 28, 2011

/s/ James P. Jones
United States District Judge