

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

JOHN MCCURLEY, DAN
DEFOREST, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

ROYAL SEA CRUISES, INC,

Defendant.

Case No. 17-cv-00986-BAS-AGS

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
FIRST AMENDED MOTION TO
STRIKE WITNESS DECLARATIONS,
FOR RESTRAINING ORDER, FOR
MONETARY SANCTIONS, AND FOR
DISQUALIFICATION OF COUNSEL**

[ECF No. 129]

On March 4, 2020, Plaintiffs filed a First Amended Motion to Strike Witness Declarations, for Restraining Order, for Monetary Sanctions, and for Disqualification of Counsel (“Motion”). (ECF No. 129.) Defendant opposed the Motion on April 6, 2020 and Plaintiffs replied on April 13, 2020. (Opp’n, ECF No. 168; Reply, ECF No. 169.) After hearing oral argument on the Motion (ECF No. 189), and for the reasons stated below, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs’ Motion.

I. STATEMENT OF FACTS

On March 27, 2019, this Court certified a class of individuals who had received telephone calls from non-party Prospects DM, Inc. (“Prospects”) on behalf of Defendant Royal Seas Cruises, Inc. (“Royal”) by use of an automatic telephone dialing system (“ATDS”) between November 2016 and December 2017, where such calls were placed for the purposes of marketing to non-customers of Royal and whose cellular telephone

1 numbers had been obtained via two websites: www.diabeteshealth.info or
2 www.youautohealthlifeinsurance.com. (ECF No. 87.) The Court certified a Subclass of
3 the above individuals who were actually transferred to Royal after Prospects made the call.
4 (*Id.*)¹

5 For a variety of reasons, class notice did not go out to potential class members until
6 one year later in March 2020. After certification, Defendant began contacting class
7 members. Defendant called all individuals who were transferred from
8 www.diabeteshealth.info, and to whom a sale was actually made. (Dep. of Melissa
9 Hanson (“Hanson Dep.”) 23:10–13, Ex. 2 to Opp’n ECF No. 168-2.) Thus, all of these
10 individuals had been transferred from Prospects to Royal and were, therefore, members of
11 the Subclass. Defendant placed approximately 560 calls to these class members. (Hanson
12 Dep. 22:1–3.) Defendant reached 23 individuals, 19 of whom Defendant admits were
13 class members. (Opp’n at 4.) Three of these class members signed affidavits indicating
14 that they had voluntarily entered their telephone number in the www.diabetesthealth.info
15 website and consented to be called. (Opp’n at 6.)

16 Defendant used a script, drafted by Defendant’s attorneys, to contact these class
17 members. (Hanson Dep. 19:4–8.)²

18
19 ¹ Plaintiffs have now moved to decertify the larger class as Prospects’ records do not identify whether the
20 class members identified above were contacted on behalf of Royal or some other non-party. (ECF 132.)
21 Therefore, Plaintiffs seek to proceed solely on the Subclass of individuals who were actually transferred
22 to Royal. (*Id.*) Defendant has moved to decertify the class in its entirety. (ECF No. 143.) Those motions
23 are still pending before this Court.

24 ² It is noteworthy to see the entire script of the planned call:

25 Good morning /afternoon Mr. /Mrs. _____. My name is _____ and I
26 am with the customer service department of Royal Seas Cruises.

27 We see that you purchased your vacation package from Royal Seas Cruises on
28 ____ (date)____ and you have (already traveled/ not traveled).

– If Traveled:

- o How was your trip?
- o What was your favorite part?
- o Are there areas we can improve on?

– If not Traveled:

- o Is there a reason you have not traveled yet?

1 **II. PROCEDURAL HISTORY**

2 Plaintiff filed a putative class action complaint on May 12, 2017. (ECF No. 1.) The
3 Court consolidated the case with another pending class action complaint, and Plaintiffs
4 filed a consolidated class action complaint on December 20, 2017. (ECF Nos. 28, 31.)

5 On July 30, 2018, Plaintiffs filed a class certification motion. (ECF No. 49.) A key
6 issue in the class certification motion was whether class members had agreed as a whole
7 to be called by entering their telephone numbers into the above two web sites and whether
8 entering their telephone numbers constituted consent to be called. (ECF No. 58, at 7.) At
9 the request of defense counsel, the Court gave Defendant additional time to investigate

-
- 10
 - 11 ○ Is there anything Royal Seas can do to help you book your vacation?

12 In reviewing your information, we show you visited diabeteshealth.info and provided your
13 information so that Royal Seas could contact you at __ (phone number) __ regarding a
complimentary cruise promotion. Is that correct?

- 14 – If Yes:

- 15 ○ Great! I am glad to see we have the correct information regarding your
16 purchase. We always like to show thanks to those that help promote our
vacations. Would you be kind enough to complete a brief survey, basically
stating that you went to diabeteshealth.info website and requested more
information about Royal Seas complimentary cruise promotion?

- 17 ■ If Yes, great, the address we have is _____ and we show your
email address as _____? Would you prefer us to email or mail
18 this document to you?
- 19 ■ We will have that sent out shortly. It will require a signature.
- 20 ■ We greatly appreciate your time today and the information you have
provided.

- 21 – If no, (try to rephrase the question)

- 22 ○ Isn't it possible you visited diabeteshealth.info website around the time you
purchased?
- 23 ○ If you are unsure about that site, do you remember how you received Royal
Seas information? Was it a different site?

- 24 ■ IF NO...
 - 25 ● Mr. /Mrs. _____, I understand you may not remember, but
could it be possible you provided your contact information to
diabeteshealth.info

26 If no..

- 27 ● Thank you for your time, we appreciate the information provide.

- 28 – If absolutely no, then just finish the call and move to next consumer.

(Ex. G to Decl. of Adrian Bacon in supp. of Mot. (“Bacon Decl.”), ECF No. 129-2.)

1 and respond. (ECF Nos. 53, 38.) Additionally, at the request of defense counsel, the Court
2 permitted Defendant to file a sur-reply, which it did on February 12, 2019. (ECF Nos. 84,
3 86.) Thus, defense counsel had seven months to investigate and brief the issue of consent.

4 On March 27, 2019, the Court ultimately granted in part the motion for class
5 certification. (ECF No. 87.) On the issue of consent, the Court found “that whether
6 Royal’s lead generation program is a valid means of obtaining consent for calls by a third
7 party concerning Royal’s services and whether the leads constitute consent are common
8 questions.” (*Id.* at 41.) The Court pointed out that the “opt-in” forms, relied on by defense
9 counsel, “may have actually been obtained through sources other than the consumer.” (*Id.*
10 at 87.)

11 After class certification was granted, the Court ordered that fact discovery be
12 completed by October 18, 2019. (ECF No. 91 at ¶ 5.) At the request of the parties, this
13 order was modified to allow fact discovery to be completed by February 19, 2020. (ECF
14 No. 113.)

15 On January 17, 2020, one month before fact discovery was scheduled to be closed,
16 Defendant served a Second Supplemental disclosure on Plaintiffs’ counsel identifying
17 three class members as witnesses and providing three signed declarations from these
18 witnesses dated August 7, 2019, September 23, 2019 and October 2, 2019. (Ex. A to
19 Bacon Decl., ECF No. 129-2.) Plaintiffs immediately filed a motion asking that these
20 declarations be excluded. (ECF No. 120.) Defense counsel moved to conduct discovery
21 of class members on February 10, 2020, asking, for the first time, that they be allowed to
22 depose the three witnesses they had already contacted *ex parte*. (ECF No. 123; *see also*
23 Bacon Decl. ¶ 7.) Plaintiffs then filed the instant First Amended Motion on March 4,
24 2020. (ECF No. 129.)³

25
26
27 ³ Plaintiffs also object to Defendant’s Exhibits 1 and 3 as unauthenticated. (ECF No. 169-2.) The Court
28 **OVERRULES** this objection. The exhibits are largely irrelevant to the Court’s ultimate decision in this
Order.

1 III. ANALYSIS

2 There is no question that “[a] lawyer is forbidden from communicating with a party
3 the lawyer knows to be represented by counsel, regarding the subject of the representation,
4 without counsel’s consent.” *See Parks v. Eastwood Ins. Services, Inc.*, 235 F. Supp. 2d
5 1082, 1082 (C.D. Cal. 2002) (citing Rule of Professional Conduct of the Calif. State Bar,
6 Rule 2-100; ABA Model Rules of Professional Conduct, Rule 42). “Once an attorney-
7 client relationship is established, the attorney serves as a shield protecting the client.” *Id.*

8 “In a class action certified under Rule 23 . . . absent class members are considered
9 represented by class counsel unless they choose to ‘opt out.’” *Id.* (citing *Kleiner v. First*
10 *Nat’l Bank of Atlanta*, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985)); *see also Resnick v.*
11 *American Dental Ass’n*, 95 F.R.D. 372, 376 (N.D. Ill.1982) (“After a court has certified
12 a case as a class action and the time for exclusions has expired, the attorney for the class
13 representative represents all class members who are otherwise unrepresented by counsel.
14 Defense counsel must observe the rules of ethical conduct in those circumstances and
15 communicate with the opposing parties through their attorney, who is counsel for the
16 class.”) (quoting 2 Newberg, *Class Actions* § 2730(d), at 1220 (1977)). The issue
17 becomes a little more difficult when, as here, the class has been certified, but the potential
18 class members have not yet been given the opportunity to opt out.

19 “Many courts have adopted the view that the attorney-client relationship between
20 class counsel and class members attache[s] upon entry of an order certifying the class and
21 does not await the expiration of any opt out period.” McLaughlin on *Class Actions* §11.1
22 (citing *Kleiner*; *Good v. W. Virginia Am. Water Co.*, No. 2:14-01374, 2016 WL 6404006,
23 at *2 (S.D. W.Va. 2016); *Fulco v. Continental Cablevision, Inc.*, 789 F. Supp. 45, 47 (D.
24 Mass. 1992); *Gortat v. Capala Bros. Inc.*, No. 07-cv-3629 (ILG) (SMG), 2010 WL
25 1879922, at *2 (E.D.N.Y. 2010), *objections overruled* 2010 WL 3417847 (E.D.N.Y.
26 2010); *see also Dodona I, LLC v. Goldman, Sachs and Co.*, 300 F.R.D. 182, 187 (S.D.N.Y.
27 2014) (“The majority of courts, including at least one court in this district, have found that
28 class certification itself creates an attorney-client relationship, at least for the limited

1 purpose of aiding prospective class members in deciding whether or not to join the class
2 action.”) (quotations and citations omitted). “Other courts, and the American Bar
3 Association, have expressed the view that the attorney-client relationship is established
4 only upon expiration of the opt out period.” *McLaughlin on Class Actions* §11.1 (citing
5 *In re Wells Fargo Wage & Hour Emp’t Practice Litigation*, 18 F. Supp. 3d 844, 851 (S.D.
6 Tex. 2014); *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 9194 (CM), 2010 WL 339098,
7 at *2 (S.D.N.Y. 2010); *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008
8 WL 4401970, at *3 (E.D. La. 2008); A.B.A. Committee on Ethics and Prof’s
9 Responsibility, Formal Op. 07-445, at 3 (2007).

10 The reason for prohibiting contact between defense counsel and the unnamed
11 members of the class is that unilateral contact by defense counsel “is rife with potential
12 for coercion.” *Kleiner*, 751 F.2d at 1202. “Unsupervised, unilateral communications with
13 the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis
14 of a one-sided presentation of the facts without the opportunity for rebuttal. The damages
15 from misstatements could well be irreparable.” *Id.*; *see also Dodona*, 300 F.R.D. at 184–
16 5 (“The court’s primary purpose in supervising communications is . . . to ensure that
17 potential class members receive accurate and impartial information regarding the status,
18 purposes and effects of the class action.”) (quotation omitted).

19 Even pre-certification, “[t]he Supreme Court has held that Rule 23 allows a court,
20 in appropriate circumstances to restrict communications between a party and members of
21 a . . . putative class.” *Ralph Oldsmobile, Inc., v. General Motors Corp.*, No. 99 Civ. 4567
22 (AGS), 2001 WL 1035132, at *2 (S.D.N.Y. Sept. 7, 2001) (citing *Gulf Oil v. Bernard*, 452
23 U.S. 89 (1981)). Restricting communications must be based on a clear record and specific
24 findings showing the reason the limitation is necessary. *Gulf Oil*, 452 U.S. at 101–102.
25 Communications that are coercive or misleading or those that “solicit[] opt outs, or even
26 simply discourage[e] participation in a case, undermine the purposes of Rule 23” and can
27 warrant court intervention. *Marino v. CACafe, Inc.*, No. 16-cv-6291 YGR, 2017 WL
28 1540717, at *2 (N.D. Cal. Apr. 28, 2017). “The test for coercion is whether the conduct

1 somehow overpowers the free will or business judgment of the potential class members.”
2 *Jenifer v. Delaware Solid Waste Authority*, Nos. CIV.A 98-270-MMS, CIV.A 98-565-
3 MMS, 1999 WL 117762, at *5 (D. Del. Feb. 24, 1999). Communications that conceal
4 material information are misleading. *Marino*, 2017 WL 1540717, *2; *see also O’Connor*
5 *v. Uber Technologies, Inc.*, No. C-13-3826 EMC, 2014 WL 1760314, at *7 (N.D. Cal.
6 May 2, 2014).

7 The Court is particularly troubled by Defendant’s communication with the class
8 members in this case. First, in the call, Defendant suggests that the question it asks is
9 largely irrelevant except for marketing purposes. Therefore, Defendant misleads the class
10 members into thinking the answer is not personally important to the class member. (“We
11 always like to show thanks to those [websites] that help promote our vacations.”).

12 Second, the questions in the script used by Defendant are made in a leading fashion,
13 suggesting the answer Defendant would like the class member to give. (“We show you
14 visited *diabeteshealth.info* and provided your info so that Royal Seas could contact you at
15 (phone number) regarding complimentary cruise promotion. Is that correct?”). Third, if
16 the class member does not give the desired response, the question is repeated multiple
17 times in an increasingly suggestive way, encouraging the class member to give Defendant
18 the desired answer. (“Isn’t it possible you visited *diabeteshealth.info* website around the
19 time of your purchase?” and, if no, “Mr./Mrs. _____, I understand you may not remember
20 but could it be possible you provided your contact info to *diabeteshealth.info*?”)

21 Overlaid over this questioning is the fact that Defendant is dealing with relatively
22 unsophisticated members of the public who are hoping to get awards from the Defendant.
23 Defendant has the discretionary ability to offer to extend the time period in which a class
24 member can redeem his or her award, which gives some class members added incentive
25 to go along with the suggestive answers Defendant has made it clear it is looking for.

26 A look at the transcripts of two of the calls made by Defendant is instructive. In the
27 call with witness Geiger, Mr. Geiger says he doesn’t remember whether he put his
28 telephone number into the *diabeteshealth.info* website, but Defendant then offers him a

1 12-month extension of his cruise if he were to “remember” putting his telephone number
2 in. (Audio File No. 300000000151480-7046270980 (lodged with the Court), Ex. H to
3 Bacon Decl., ECF No. 129-2.) And when Defendant called witness Winter, it told him it
4 had a “little bit of a promotion going on.” If Mr. Winter would just fill out a “survey”
5 saying he had put his telephone number into the diabeteshealth.info website, then
6 Defendant could extend his cruise without any additional money from him. (Audio File
7 No. 300000000172377-4049353474 (lodged with the Court), Ex. I to Bacon Decl., ECF
8 No. 129-2.)

9 Contrary to the accusation made by Defendant that Plaintiffs are not searching for
10 the truth in this action, it is *Defendant’s* actions that suggest an attempt to obfuscate the
11 truth. If Defendant was seeking truth, it could have asked neutral questions, not suggesting
12 the answer it was seeking. If it was seeking truth, it could have worked with Plaintiffs to
13 conduct discovery of class members. And, if Defendant had been seeking truth, it would
14 not have omitted any information about the fact that a class action existed, that this
15 individual was a member of the class, and that the class member was represented by class
16 counsel if he or she so desired. That Defendant was intentionally leaving out this
17 information is made clear by the fact that Defendant refers to the affidavits it seeks to
18 obtain from class members, as “surveys.” Clearly, Defendant was seeking to mislead the
19 class members it contacted.

20 Defendant’s conduct is particularly egregious because the answer it is suggestively
21 encouraging the class member to give is contrary to the class members’ interest. Unlike
22 many of the cases cited by defense counsel, Defendant was not seeking to settle with the
23 class member; it was seeking to strip the class member of any rights, without explaining
24 the importance of the question it was asking.

25 The Court finds that the attorney-client relationship attached when the Court
26 ordered the class certified in this case. Defense counsel thus violated an ethical rule when
27 they encouraged their client to contact an individual the lawyer knew to be represented by
28 counsel, regarding the subject of the representation, without counsel’s consent.

1 Furthermore, the communications were misleading, omitted material facts about the
2 existence of the class action, and were coercive in that they used suggestive, leading
3 questions, offered incentives for giving the “right” answers, and suggested the answers
4 were not important except for marketing purposes.

5 Therefore, the Court finds it appropriate to grant Plaintiffs’ request to order
6 Defendant and Defense counsel not to contact any class members on an *ex parte* basis
7 about the subject of this case, without the consent of the class members’ attorney, Class
8 Counsel. Any contact exploring the issue of consent should be done only with the presence
9 of Class Counsel. Second, since the affidavits were obtained by misleading and coercing
10 the class members, the Court finds it appropriate to grant Plaintiffs’ request to strike the
11 three affidavits given by class members as “surveys” to Defendant. Defendant’s theory is
12 that all of the class members consented by putting their names in the website. The
13 suggestive and misleading nature of the communications Defendant made on an *ex parte*
14 basis has cast doubt on these three witnesses’ credibility. Therefore, the Court **GRANTS**
15 Plaintiffs’ request to strike Defendant’s Second Supplemental Disclosure and the
16 declarations attached thereto. Finally, the Court **GRANTS** the request to bar the testimony
17 of any class member, contacted by Defendant after certification of the class, as a sanction
18 for Defendant’s misleading and coercive questioning.

19 Plaintiffs also ask for additional sanctions: monetary to cover the cost of bringing
20 this motion, and to disqualify counsel. The Court finds the former is warranted but the
21 latter is not.

22 District judges have “an ‘arsenal of sanctions they can impose for unethical
23 behavior.’” *Terrebonne, Ltd. Of Calif. v. Murray*, 1 F. Supp. 2d 1050, 1054 (E.D. Cal.
24 1998) (quoting *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996)). “These
25 sanctions include monetary sanctions, contempt and disqualification of counsel.” *Id.*
26 “While the district court should issue sanctions under a rule or statute if possible . . . it is
27 not so limited and has discretion to rely on its inherent powers to sanction attorney
28

1 misconduct.” *Id.* at 1056 (citations omitted). “Sanctions imposed under the court’s
2 inherent power requires a specific finding of bad faith.” *Id.* (citations omitted).

3 “[T]he primary purpose of sanctions . . . is to deter subsequent abuses.” *Matter of*
4 *Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986). “It is crucial . . . that a sanctions award be
5 quantifiable with some precision and properly itemized in terms of the perceived
6 misconduct and the sanctioning authority.” *Id.* at 1184. “When the sanctions award is
7 based upon attorney’s fees and related expenses, an essential part of determining the
8 reasonableness of the award is inquiring into the reasonableness of the claimed fees.
9 Recovery should never exceed those expenses and fees that were reasonably necessary to
10 resist the offending action.” *Id.* at 1184–85. “The measure to be used is not actual
11 expenses and fees but those the court determines to be reasonable.” *Id.* (quotation
12 omitted).

13 State law is applicable in determining whether an attorney should be disqualified
14 from continued representation in a case. *Moreno v. Autozone*, No. C05-04432 MJJ, 2007
15 WL 4287517, at *2 (N.D. Cal. Dec. 6, 2007) (citing *In re Cty. of Los Angeles*, 223 F.3d
16 990, 995 (9th Cir. 2000)). “Disqualification motions are subject to strict judicial scrutiny
17 given the potential for abuse.” *Id.* In California, “[d]isqualification based on a violation
18 of [Disciplinary] Rule 2-100 lies within the court’s discretion.” *Id.* at *10 (citing
19 *Chronometrics, Inc. v. Sysgen, Inc.*, 110 Cal. App. 3d 597, 607–08 (1980)).
20 “Disqualification is proper if counsel’s misconduct is likely to have a continuing effect on
21 the proceedings.” *Id.*

22 In this case, for the reasons stated above, the Court finds Defendant’s contact with
23 the class members and misleading coercive behavior in obtaining the affidavits to be
24 unethical and in bad faith. However, Defendant claims, and Plaintiffs do not dispute, that
25 once Plaintiffs contacted defense counsel, they agreed to withdraw the three declarations
26 in the Second Supplemental Disclosure, and agreed that no additional contact with class
27 members would occur. Therefore, part of what is sought in this Motion could have been
28 obtained by agreement between the parties. The sticking point, apparently, was whether

1 Defendant would then be permitted to depose the three class members with whom it had
2 had *ex parte* communications. The Court agrees with Plaintiffs that Defendant's *ex parte*
3 contact, which included misleading and suggestive questions, tainted the future testimony
4 of these three class members. Therefore, Defendant will not be permitted to use the
5 testimony of these three individuals, or, in fact, the testimony of any class member
6 contacted by Defendant using the script asking about contact with the diabeteshealth.info
7 website. To the extent Class Counsel were required to bring a motion to accomplish this
8 task, the Court finds it appropriate to order Defendant and defense counsel to reimburse
9 Plaintiffs for the cost of this motion practice as a sanction for the initial behavior.
10 Therefore, the Court **GRANTS** Plaintiffs' request for monetary sanctions to reimburse
11 Plaintiffs for the costs of bringing this Motion, as well as the costs of investigating the
12 contact made by defense counsel.

13 However, the Court does not find that the *ex parte* contact with the three class
14 members is likely to have a continuing effect on the proceedings. The Court has stricken
15 both the affidavits and those three individuals as witnesses, curing any long-term
16 continuing effect even if defense counsel continues representation. Defense counsel have
17 voluntarily agreed not to contact any other class members. Therefore, the Court finds
18 disqualification is unnecessary and **DENIES** Plaintiffs' Motion for Disqualification of
19 defense counsel.

20 **IV. CONCLUSION**

21 Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's
22 Motion (ECF No. 129) and orders as follows:


23 (1) Plaintiffs' Motion to Strike Witness Declarations is **GRANTED**. The Court
24 further orders Defendant and defense counsel not to have any contact with class members
25 on an *ex parte* basis, about the subject of this case, without the consent of the class
26 members' attorney, Class Counsel. Any contact exploring the issue of consent should be
27 done only with the presence of Class Counsel.
28

1 (2) The Court further **GRANTS** Plaintiffs' Request for Monetary Sanctions.
2 Plaintiffs' counsel is ordered to file a detailed request for attorneys' and other fees,
3 detailing the costs of bringing the instant Motion by **August 14, 2020**. Any opposition to
4 the motion for attorneys' fees (other than the reasons for imposing the fee, which has
5 already been ruled on by this Court) must be filed by **August 28, 2020**. Any reply should
6 be filed by **September 4, 2020**.

7 (3) Finally, the Court **DENIES** Plaintiffs' Motion for Disqualification of
8 Defense Counsel.

9 **IT IS SO ORDERED.**

10
11 **DATED: July 31, 2020**


Hon. Cynthia Bashant
United States District Judge

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28