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Defendants the National Football League (the “NFL”), Jerral “Jerry” Wayne Jones, Dallas Cowboys Football Club, Ltd., JWJ Corporation, Cowboys Stadium, L.P., Cowboys Stadium, G.P., LLC, and Blue & Silver, Inc. file this Opposition to Plaintiffs’ Motion for Case Management Order Restricting Defendants from Engaging in Improper Communications with Unnamed Class Members (the “Motion”).

### INTRODUCTION

Plaintiffs rushed into Court with an emergency motion accusing the NFL of improper “efforts to coerce unnamed class members to waive their claims without knowing their full legal rights and remedies.”<sup>1</sup> But their “Appendix of Evidence” does not cite a single example of any such purported improprieties, and the record demonstrates that Plaintiffs’ charges are completely baseless. The three declarations from unnamed potential class members submitted by Plaintiffs reflect nothing more than good customer service: the NFL has been asking fans who were adversely affected by problems with the temporary seat installation at Super Bowl XLV to provide their contact and seat information through a dedicated website so that the NFL can deliver them detailed information packets regarding the NFL’s publicly-announced offers of reimbursement.<sup>2</sup> There is zero evidence of the misleading or coercive communications that must be shown under the governing legal standard before restricting a party’s communications with unnamed potential class members. To the contrary, the record shows that the NFL’s communications have been entirely appropriate.

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<sup>1</sup> Motion at 2.

<sup>2</sup> The NFL is willing to accept as true for the purposes of Plaintiffs’ Motion the three declarations from unnamed class members, and in accordance with this Court’s Order during the February 16 telephonic hearing accordingly informed Plaintiffs’ counsel that no Rule 30(b)(6) deposition would be required. As the NFL made clear, it does not accept those portions of Plaintiffs’ counsel’s declaration that consist of characterizations, conclusions and speculation. Ex. 1 at D.App. 1-5. The NFL’s Exhibits are contained in the Appendix filed herewith and are cited to as “Ex. \_\_ at D.App. \_\_.”

What Plaintiffs' Motion does is seek to improperly prevent the NFL from continuing good faith and reasonable communications with its customers. Those communications began on the day of the Super Bowl XLV game. Contrary to the Motion's claim that the NFL "began" contacting ticketholders "after the filing of this class action,"<sup>3</sup> the NFL's initial offer and second reimbursement option, added in response to feedback from impacted fans, were both made before Plaintiffs filed this lawsuit. Such voluntary remedial measures are entirely consistent with the public policy considerations that promote good business practice and the early resolution of disputes.

Plaintiffs' Motion is not supported by the law or the facts. The law indisputably permits the NFL to communicate with its customers, and to make settlement offers to them, even though the customers may be part of a putative class. The impacted ticketholders have the right to decide for themselves whether to accept the reimbursement the NFL is offering, provided that such contacts have not been coercive, misleading or undertaken with pressure tactics.

Nothing of the sort has been shown here. To the contrary, the NFL's written information packet sent to ticketholders (i) makes clear that accepting the offer will result in a release of their legal claims, including claims in this lawsuit, (ii) refers the ticketholder to the website set up by Plaintiffs' counsel for more information about the legal claims, and (iii) cautions ticketholders that **"THIS RELEASE OF CLAIMS AFFECTS YOUR LEGAL RIGHTS. . . . YOU MAY WISH TO DISCUSS THIS MATTER WITH AN ATTORNEY."**<sup>4</sup> Moreover, the NFL has

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<sup>3</sup> Motion at 2. Plaintiffs' counsel's declaration retreats from the assertion that the NFL's offers followed the filing of the lawsuit, but implies instead that the offers were made in response to a press release counsel issued the morning of February 8, 2011, threatening a lawsuit. See Supplemental Declaration of Michael J. Avenatti, ¶¶ 2-3. That press release, however, did not threaten any lawsuit on behalf of the fans to whom the NFL has made offers or whose communications are the subject of the Motion. Rather, the release threatened litigation on behalf of so-called "Founders" of Cowboys Stadium. Ex. 2 at D.App. 6.

<sup>4</sup> Ex. 3 at D.App. 18 (emphasis in original).

provided ample time, 30 days, for the offer to be accepted or rejected. Plaintiffs' assertion that ticketholders must agree to waive their claims by March 1, 2011 is simply not true.

As Plaintiffs conceded at the February 16 telephonic hearing: "If there are potential class members, who after being fully aware of all of the facts of what their legal rights and remedies are under Texas law, et cetera, if those individuals want to make an informed decision and sign a waiver, absent coercion, and with full and complete information, they're entitled to do that."<sup>5</sup> That is precisely the situation here. In these circumstances, the NFL should not be enjoined from continuing to engage with its fans to resolve their concerns regarding seating issues at Super Bowl XLV. The Motion should be denied in its entirety.

#### **STATEMENT OF RELEVANT FACTS**

The NFL hosted the Super Bowl XLV game at Cowboys Stadium on February 6, 2011, with more than 103,000 fans in attendance. Ex. 4 at D.App. 20; *see also* First Amended Complaint ("Compl."), ¶ 4.5. Due to issues with temporary seating that was to be installed at the stadium, approximately 400 ticketholders (the "400 Group") could not be seated for the game. Ex. 5 at D.App. 21; Compl., ¶ 4.8. Another estimated 2,000 ticketholders (the "2000 Group") ultimately were provided seats, but experienced delays before being seated. Ex. 6 at D.App. 22; Compl., ¶¶ 4.7, 5.3.<sup>6</sup>

On the day of the Super Bowl, fans who were identified as members of one of these groups were given letters from the NFL apologizing for the inconvenience and offering refunds. Exs. 7, 8 at D.App. 23-24. The letter to the 400 Group advised that the NFL would be offering them a refund of three times the face value of their tickets. Ex. 7 at D.App. 23. The letter to the

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<sup>5</sup> Transcript of February 16, 2011 Hearing at 12.

<sup>6</sup> Neither Plaintiffs' Motion nor their declarations allege or relate to any communications with the "Founders" group referenced in the complaint.

2000 Group advised that the NFL would provide a refund of the face value of their tickets. Ex. 8 at D.App. 24.

The day after the Super Bowl, the NFL publicly addressed the seating problems, apologized to fans that were affected, and took ultimate responsibility for the fan experience. Ex. 9 at D.App. 26; *see also* Supplemental Decl. of Michael J. Avenatti, Ex. C. The NFL also announced that it had begun communicating with fans, and would continue to do so to take care of them in an appropriate way. Ex. 9 at D.App. 28, 30.

Based on feedback received from fans, and before any lawsuits were filed, NFL Commissioner Roger Goodell publicly announced on February 8, 2011 that the 400 Group would be offered two options in an effort to compensate them for their inconvenience, namely the choice of:

1. One free ticket to next year's Super Bowl game plus a cash payment of \$2,400 (three times the face value of the Super Bowl XLV game ticket held by the individual). The ticket to next year's Super Bowl game is transferable.

[OR]

2. One free ticket to a future Super Bowl game of the fan's choice, including next year's if so desired, plus round trip airfare and hotel accommodations provided by the NFL. This offer will be personalized in the ticketholder's name and is not transferable.

Ex. 5 at D.App. 21; Supplemental Decl. of Michael J. Avenatti, Ex. A.<sup>7</sup> The NFL's February 8 press release noted that the NFL was in the process of collecting contact information for those in the 400 Group and provided directions on how any such ticketholder could provide his or her contact information to the NFL. *Id.* The press release notified these individuals that "[a]

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<sup>7</sup> On February 10, 2011, the NFL similarly issued a press release announcing that the 2000 Group was being offered two options in an effort to compensate them for their convenience: (1) a refund of the face value of their ticket, or (2) a free ticket to a future Super Bowl game of their choice. Ex. 6 at D.App. 22. As with the 400 Group, members of the 2000 Group also have been asked to register on a website in order to receive a complete packet of information concerning the offers. It is anticipated that the NFL will soon begin sending packets to those members of the 2000 Group that register on the website.

personal call from a senior NFL staff member will follow to answer questions and provide information on how the fan's choice will be confirmed and fulfilled." *Id.*

After the announcement of the NFL's offers, affected ticketholders who had been identified were contacted by NFL personnel. *See e.g.*, Declaration of Norm Talkowski, ¶ 3; Declaration of Constance Young, ¶ 3; Declaration of Jason Wagler, ¶¶ 12-14. Among other things, fans were requested to register on a website the NFL had established to collect their complete contact and seat information. *See, e.g.*, Wagler Decl., ¶¶ 12-14; Talkowski Decl., ¶ 4. Fans were advised that after they registered, they would receive an information packet concerning the NFL's offers and would have 30 days from the mailing date to consider them before making a decision. Supplemental Decl. of Michael J. Avenatti, Ex. B; Wagler Decl., ¶¶ 12-14; Ex. 11 at D.App. 32; Ex. 3 at D.App. 8-19.

On February 15, 2011, in response to input received from fans, Commissioner Goodell publicly announced that the 400 Group would be offered a third option from which to choose, in addition to the two options described above: "A refund for the greater of \$5,000 or your actual substantiated expenses in approved categories for attending Super Bowl XLV." Ex. 10 at D.App. 31; *see also* Supplemental Decl. of Michael J. Avenatti, Exs. B, F. On the morning of February 15, 2011, an e-mail communicating this option was sent to members of the 400 Group for whom the NFL had e-mail addresses. Ex. 11 at D.App. 32. Fans who had not already registered were advised that the deadline for registering on the website to receive the full information packets was March 1, 2011. *Id.*

On February 16, 2011, the NFL first sent via Federal Express the information packets to members of the 400 Group who had registered on the website. Ex. 3 at D.App. 8-19; *see also* Supplemental Decl. of Michael J. Avenatti, ¶ 9. The packets included: (1) a letter from

Commissioner Goodell; (2) a Plan for Reimbursement, which set forth the three options previously communicated; (3) a list of “Frequently Asked Questions,” with corresponding answers; and (4) a Super Bowl XLV Game Reimbursement Election Form (“Election Form”), which includes a release of claims by the ticketholder. Ex. 3 at D.App. 8-19. The packet advises ticketholders who wish to accept one of the three options that they must return the Election Form within 30 days of the FedEx mailing date. Ex. 3 at D.App. 11, 12. In other words, no ticketholder is required to make an election to accept the NFL’s offer until March 18, 2011 at the earliest.

Contrary to Plaintiffs’ suggestion, the NFL has not attempted to mislead, pressure or coerce ticketholders into releasing their legal claims in this lawsuit or otherwise. In the Frequently Asked Questions document, the NFL makes clear that the ticketholder is giving up potential claims, including those in this lawsuit, and cautions the ticketholder that he or she may want to consult with an attorney before accepting the offer:

**By accepting one of the Options described in the Reimbursement Election Form, am I giving up anything?**

Yes. The Reimbursement Election Form includes a release of any and all claims you have against the NFL or any of its affiliates for any harm or inconvenience caused by the incident. Signing the release means you cannot participate in *Simms, et al. v. Jones, et al.*, Civ. No. 3:11-CV-00248 M, a proposed class action lawsuit currently pending in federal court in the Northern District of Texas, *Laffin, et al. v. National Football League, et al.*, DC-11-01414, a proposed class action lawsuit currently pending in state court in Texas District Court, Dallas County, or any other lawsuits relating to the incident. More information on the claims released, as well as the *Simms* and *Laffin* lawsuits, is provided in Paragraph 3 of the Reimbursement Election Form. By accepting one of the Options described in the Reimbursement Election Form and submitting that form, you are releasing all such claims. Because submitting the form affects your legal rights, you may wish to discuss this matter with an attorney.

Ex. 3 at D.App. 13; *see also* Supplemental Decl. of Michael J. Avenatti, Ex. B (same disclosure on NFL website). The release set forth in Paragraph 3 of the Election Form goes further,

directing the ticketholder to Plaintiffs' counsel's website, [www.ticketlawsuit.com](http://www.ticketlawsuit.com),<sup>8</sup> for more information about this lawsuit:

Claims that fall within the definition of Released Claims include all of those asserted in two pending lawsuits: *Simms, et al. v. Jones, et al.*, Civ. No. 3:11-CV-00248 M, a proposed class action lawsuit currently pending in federal court in the Northern District of Texas; and *Laffin, et al. v. National Football League, et al.*, DC-11-01414, a proposed class action lawsuit currently pending in state court in Texas District Court, Dallas County, as well as any other lawsuits that may be filed relating to the Incident. Both of the pending lawsuits purport to have been brought on behalf of all ticketholders harmed as a result of the Incident. More information about the *Simms* lawsuit can be found at the website <http://www.ticketlawsuit.com>. More information about the *Laffin* lawsuit can be obtained by contacting counsel for the plaintiffs in that action, Goldfarb Branham LLP (<http://goldfarbbranham.com>). **THIS RELEASE OF CLAIMS AFFECTS YOUR LEGAL RIGHTS.** By accepting one of the Options described above, Qualified Ticket Holder is giving up the right to participate in any lawsuit related to the Incident, including the *Simms* and *Laffin* lawsuits. **YOU MAY WISH TO DISCUSS THIS MATTER WITH AN ATTORNEY.**

Ex. 3 at D.App. 18 (emphasis in original).

Even if the NFL had not voluntarily made these disclosures about the lawsuit, affected ticketholders would have found it hard to be unaware of this case, or Plaintiffs' counsel's criticisms of the NFL's offers, in light of the media campaign that has been conducted by Plaintiffs' counsel regarding this case. Ex. 12 at D.App. 33-34; Ex. 14 at D.App. 36-43; *see also* <http://espn.go.com/dallas/radio/archive?id=4503352> (webpage with link to radio interview given by Plaintiffs' counsel on February 10); Ex. 15 at D.App. 44-46 (unofficial transcript of ESPN interview); <http://video.foxbusiness.com/v/4540267/nfl-cowboys-sued-over-super-bowl-seating-disaster/> (link to Plaintiffs' counsel's television interview on Fox Business News on February 15); Ex. 16 at D.App. 47-48 (unofficial transcript of FOX interview).

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<sup>8</sup> Plaintiffs' counsel's website, [www.ticketlawsuit.com](http://www.ticketlawsuit.com), purports to explain why the NFL's offers to fans are "unacceptable, unsportsmanlike and unfair." Ex. 12 at D.App. 33. The website, however, apparently has not been updated since February 11, 2011, is based on outdated information, and sets forth a misleading description of the NFL's offers. *Id.* To avoid fans being misled by this website, the NFL's undersigned counsel sent a letter to Plaintiffs' counsel on February 22, 2011 demanding that the website be updated with complete and accurate information or taken down. Ex. 13 at D.App. 35. That letter has been ignored, and the website remains unchanged.

## ARGUMENT

### I. Plaintiffs Have Failed to Satisfy Their Burden of Proving a Clear Record of Abusive Communications with Unnamed Putative Class Members

#### A. The NFL Is Permitted To Communicate With Unnamed Putative Class Members Absent A Clear Record Of Abuse

It is well-established that a defendant may communicate *ex parte* with unnamed putative class members,<sup>9</sup> and “has the right to communicate settlement offers directly to [them].”<sup>10</sup> This right to discuss settlement is mutual, as unnamed putative class members themselves have a right to independently and directly resolve their claims.<sup>11</sup> As one court aptly put it, putative “class members do not become wards, incompetent to deal with their own property, by reason of the unilateral filing of class action complaints by one of their number.”<sup>12</sup>

Cognizant of these rights and First Amendment limitations on restrictions of speech, the Supreme Court in *Gulf Oil* placed strict limits on a court’s authority to restrict a party’s communications with unnamed putative class members.<sup>13</sup> A court should not restrict such communications without a “clear record and specific findings that reflect a weighing of the need

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<sup>9</sup> Plaintiffs concede as much. Motion at 3 (“Before a class is certified in a class action, counsel for both plaintiffs and defendants may communicate with the putative class, *ex parte*, about the lawsuit.”).

<sup>10</sup> *Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc.*, 214 F.R.D. 696, 699 (S.D. Ala. 2003); *e.g.*, *Kay Co., LLC v. Equitable Prod. Co.*, 246 F.R.D. 260, 263 (S.D.W. Va. 2007) (“Courts have recognized that, generally, a defendant may discuss settlement offers with putative class members prior to class certification.”); *Bublitz v. E.I. DuPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000) (“A defendant-employer has the right to communicate settlement offers directly to putative class member employees.”); *Jenifer v. Del. Solid Waste Auth.*, 1999 U.S. Dist. LEXIS 2542, at \*10 (D. Del. Feb. 25, 1999) (“before a class action is certified, it will ordinarily not be deemed inappropriate for a defendant to seek to settle individual claims”); *In re Winchell’s Donut Houses, L.P. Sec. Litig.*, 1988 WL 135503, at \*1 (Del. Ch. Dec. 12, 1988) (“it seems well settled that before a class action is certified, it will ordinarily not be deemed to be inappropriate for a defendant to seek to settle individual claims, even though a class claim has been asserted”); MANUAL FOR COMPLEX LITIGATION, FOURTH at §21.12 (2004) (“Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification...”).

<sup>11</sup> Plaintiffs conceded this too: “If there are potential class members, who after being fully aware of all of the facts of what their legal rights and remedies are under Texas law, et cetera, if those individuals want to make an informed decision and sign a waiver, absent coercion, and with full and complete information, they’re entitled to do that.” Transcript of February 16, 2011 Hearing at 12.

<sup>12</sup> *In re Winchell’s Donut Houses, L.P. Sec. Litig.*, 1988 WL 135503, at \*1 (Del. Ch. Dec. 12, 1988).

<sup>13</sup> *See Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981).

for a limitation and the potential interference with the rights of the parties.”<sup>14</sup> The party seeking such an order bears the burden of showing the existence or at least likelihood of serious abuse; the mere possibility of abuse is insufficient as a matter of law.<sup>15</sup> Even if a court finds abuse, any restriction on communications must be “carefully drawn” and must give “explicit consideration to the narrowest possible relief which would protect the respective parties.”<sup>16</sup>

“Most judges are reluctant to restrict communications between parties or their counsel and potential class members, except when necessary to prevent serious misconduct.”<sup>17</sup> Courts have only restricted communications that are abusive: communications that attempt to mislead, coerce settlement or non-participation in the class action, or undermine cooperation with, or confidence in, class counsel.<sup>18</sup> Contrary to Plaintiffs’ suggestion in their Motion, offering or even encouraging settlement is not improper. Nor does it matter who initiates the communications.<sup>19</sup> Absent specific evidence of abusive tactics, communications seeking to settle with unnamed putative class members are entirely proper—indeed encouraged—and cannot support an order restricting communications.<sup>20</sup>

### **B. The NFL’s Communications with its Customers Are Entirely Proper**

The NFL’s communications with its customers have been entirely proper. As described more fully above, the NFL has undertaken a careful approach to communicating with

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<sup>14</sup> *Gulf Oil*, 452 U.S. at 101; *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630, 632 (N.D. Tex. 1994).

<sup>15</sup> *Gulf Oil*, 452 U.S. at 104; *Kay Co.*, 246 F.R.D. at 262; *Cox Nuclear*, 214 F.R.D. at 697-98.

<sup>16</sup> *Gulf Oil*, 452 U.S. at 102; *Hampton Hardware*, 156 F.R.D. at 632.

<sup>17</sup> MANUAL FOR COMPLEX LITIGATION, FOURTH at §21.12 (2004).

<sup>18</sup> *Kay Co.*, 246 F.R.D. at 263; *Cox Nuclear*, 214 F.R.D. at 698; *Hampton Hardware*, 156 F.R.D. at 632.

<sup>19</sup> *E.g.*, *Keystone Tobacco Co., Inc., v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 153-59 (D.D.C. 2002) (permitting communications over plaintiffs’ argument that defendant’s “settlement endeavor” consisted of “soliciting the settlements” and “seeking resolutions”); *Jenifer*, 1999 U.S. Dist. LEXIS 2542, at \*4-25 (permitting communications where defendant “contacted potential class members”).

<sup>20</sup> *E.g.*, *Kay Co.*, 246 F.R.D. at 262-63; *Cox Nuclear*, 214 F.R.D. at 697-99; *Keystone Tobacco*, 238 F. Supp. 2d at 153-59.

ticketholders. The NFL has made no false or misleading communications. The NFL has not made any claims, one-sided or otherwise, about the strength or weakness of the claims asserted in the case.<sup>21</sup> The NFL has not pressured any ticketholder into relinquishing his or her potential legal claims, or tried to trick any ticketholder into doing so. To the contrary, the NFL has (1) openly disclosed the existence of the pending class action lawsuits, including this one,<sup>22</sup> (2) advised ticketholders that they would be giving up their legal claims in this lawsuit and otherwise by accepting a settlement offer,<sup>23</sup> (3) directed ticketholders to Plaintiffs' counsel's website for more information about the legal claims in this case,<sup>24</sup> (4) cautioned ticketholders that **THIS RELEASE OF CLAIMS AFFECTS YOUR LEGAL RIGHTS. . . . YOU MAY WISH TO DISCUSS THIS MATTER WITH AN ATTORNEY,**<sup>25</sup> and (5) provided an ample 30-day period for ticketholders to consider the offers.<sup>26</sup> No one is being misled or asked to make a decision without the opportunity to gather information. Nor is there any evidence of coercion, the test for which "is whether the conduct somehow overpowers the free will or business judgment of the potential class members."<sup>27</sup> Ticketholders are free to exercise their own judgment as to whether to accept one of the various settlement options. There has been no

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<sup>21</sup> *Cf. Keystone Tobacco*, 238 F. Supp. 2d at 157 (defendants' written materials permissible despite "some self-serving advocacy").

<sup>22</sup> *Cf. Burford v. Cargill, Inc.*, 2007 U.S. Dist. LEXIS 1679, at \*4-6 (W.D. La. Jan. 9, 2007) (permitting defendants to obtain releases from putative class members so long as an appropriate notification concerning the pending litigation was given in the release documents).

<sup>23</sup> Ex. 3 at D.App. 18.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Ex. 3 at D.App. 11.

<sup>27</sup> *Jenifer*, 1999 U.S. Dist. LEXIS 2542, at \*16.

abuse whatsoever. In circumstances like this, courts routinely deny requests to limit a defendant's settlement offers to, and communications with, unnamed putative class members.<sup>28</sup>

The NFL's communications with ticketholders stand in stark contrast to the communications found abusive in the cases relied on by Plaintiffs, none of which involved settlement offers. As such, they are readily distinguishable from the facts here and offer no support for a restriction on the NFL's communications.

*Hampton Hardware* was a case in which the defendant (a member-owned wholesaler of hardware goods) sent a series of threatening, coercive, letters to the putative class members (the defendant's member-owners). For example, the defendant's letters (i) threatened that the "enormous potential cost" of defending the lawsuit "will cost you precious dollars" (as owners of the company); (ii) argued that "to avoid this waste of time and money" recipients should refuse to join the class; and (iii) claimed that "[b]y asking you to join the class, [plaintiff] is asking you to sue yourself." In short, "the clear message" was that if unnamed class members "participate in this 'improper' lawsuit that they will pay."<sup>29</sup>

Like *Hampton Hardware*, *Guifu Li* involved a defendant attempting to take advantage of an inherently coercive relationship to threaten unnamed class members. The defendant employer sought to have its employees (the members of the putative class) sign forms to "opt-out" of the

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<sup>28</sup> *Kay Co.*, 246 F.R.D. at 262-63 (denying plaintiffs' request for an order limiting communications between defendants and putative plaintiffs concerning settlement because of absence of evidence that any communication was misleading or coercive); *Burford*, 2007 U.S. Dist. LEXIS 1679, at \*4-6 (permitting defendants to obtain releases from putative class members so long as an appropriate notification concerning the pending litigation was given in the release documents); *Cox Nuclear*, 214 F.R.D. at 697-99; (refusing to prevent a defendant from sending checks to putative class members that operated as releases); *Keystone Tobacco*, 238 F. Supp. 2d at 153-59 (denying motion to preclude settlement discussions with individual plaintiffs despite finding that some communications were inappropriate); *Bublitz*, 196 F.R.D. at 548-550 (permitting defendant to issue settlement offers to putative class members, with limited conditions based on potential for coercion inherent in employer-employee relationship); *Jenifer*, 1999 U.S. Dist. LEXIS 2542, at \*4-25; *In re Winchell's Donut Houses*, 1988 WL 135503, at \*1-4 (permitting defendants to communicate with unnamed class members regarding settlement).

<sup>29</sup> *Hampton Hardware*, 156 F.R.D. at 631-33; *see also Jenifer*, 1999 U.S. Dist. LEXIS 2542, at \*16-17 ("The letters in *Hampton Hardware* served no purpose other than to warn potential class members that they would pay if they participated in the lawsuit.").

litigation, without any compensation. Plaintiff presented evidence that the defendant threatened employees with retaliation if they did not opt-out, including declarations from two workers who “signed the form even though they didn’t want to” and from a third worker who was fired (on an apparent pretense) shortly after refusing to sign the form.<sup>30</sup> The forms also were presented to workers through intimidating and unfair means: (i) the forms were presented to employees in one-on-one meetings with managers during the work day; (ii) workers were not permitted to have copies of the forms to take home; and (iii) workers were not given a translation of the form in their primary language.<sup>31</sup>

*Kleiner*, which involved an already-certified class and violations of prior court orders, similarly involved abusive communications. The defendant bank engaged in a secret campaign, timed to coincide with the judge’s vacation, to “solicit as many exclusions as possible before the court was alerted to the operation.”<sup>32</sup> More specifically, the defendant bank had its loan officers (who personally controlled customers’ lines of credit) call the class of Bank borrowers, “many of whom were dependent on the Bank for future financing,” to provide a one-sided view of the “merits of the case” and “do the best selling job they had ever done.”<sup>33</sup>

These cases illustrate the type of abusive communications that are needed under *Gulf Oil* to support a restriction on communications with unnamed putative class members, but that are entirely absent here. Unlike in the cases relied on by Plaintiffs, here there are no threats or attempts to coerce, no misleading statements, and no secret campaign. There is no factual basis

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<sup>30</sup> *Guifu Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 512-13 (N.D. Cal. 2010).

<sup>31</sup> *Id.* at 512, 517-18.

<sup>32</sup> *Kleiner v. Nat’l Bank of Atlanta*, 751 F.2d 1193, 1197-98, 1201-03 (11th Cir. 1985).

<sup>33</sup> *Id.*

for an order restricting the NFL's communications with its customers, much less the "clear record" of abuse required under *Gulf Oil*.

### CONCLUSION

It is undisputed that the NFL is permitted to make settlement offers to its customers, and its communications attempting to make things right with these customers have been entirely proper. In short, there is no factual or legal basis for placing any restrictions on the NFL's communications. Defendants therefore respectfully requests that Plaintiffs' Motion for Case Management Order Restricting Defendants from Engaging in Improper Communications with Unnamed Class Members be denied in its entirety.

February 24, 2011

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served upon its filing via this Court's CM/ECF system on this 24th day of February, 2011 on the individuals listed below:

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