UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re Flint Water Cases	No. 5:16-cv-10444-JEL-MKM Hon. Judith Levy Mag. Mona K. Majzoub

REPLY IN SUPPORT OF HALL OBJECTORS' MOTION TO ATTEND FURTHER CONFERENCES WITH SETTLING COUNSEL AND FOR SETTLING PARTIES TO PROVIDE A DESCRIPTION OF THE NON-PUBLIC HEARINGS

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INTRODUCTION

The Hall Objectors file this joint reply in support of their Motion, which was by two groups individual plaintiffs. ECF No. 1736.[1]

After missing the original deadline for responses, the State Defendants and Liaison Counsel filed oppositions to the Motion primarily arguing: (1) that the objectors are in fact represented by Class and Liaison Counsel, so that the conferences were not actually *ex parte*, and (2) that the Court has authority under Fed. R. Civ. P. 77(b) to conduct proceedings in chambers. ECF Nos. 1799 & 1800.

The responses misapprehend the Motion, and ignore recent events confirming that the May 3 conference was neither ministerial nor unrelated to the motions filed by and against objectors. The Hall Objectors do not contend that the Court cannot conduct informal conferences to, say, set lunch times. Nor do they insist that endless *pro se* objectors be permitted to attend and speak at all conferences. Hall Objectors simply contend that when the Court discusses the facts or substance of *contested motions* which include the fee motion and motion for final approval, the hearings must be public *or* at a minimum that known objectors who have appeared through separate counsel,[2] be invited to any non-public hearings to secure their individual due process rights.

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[1] Hall Objectors, joined by counsel for individual plaintiffs who represent over 10,000 settlement claimants, filed a Motion to Attend Further Conferences with Settling Counsel and for Parties to Provide a Description of Non-Public Hearings on May 10. "Motion," ECF No. 1736; ECF Nos. 1736 (*Chapman* joinder), 1769 (*Washington* joinder).

[2] Class members may appear through counsel as of right. Fed. R. Civ. P. 23(c)(2)(B)(iv). Counsel can undertake the protective order, to the extent non-public hearings air material that should be properly sealed.

The record now *confirms* what the objectors previously suspected: that the unrecorded May 3 conference, like the off-the-record portion of March 1 hearing, was both substantive and directly related to motions contested by objectors. Based on the current record, the May 3 conference concerned at least two issues vital to objectors who were excluded from the hearing: (1) facts underpinning the Order to Show Cause, and (2) the Court's direction(s) to draft a letter addressing pending objections. ECF No. 1800 ("Tr."), PageID.64652. The Court further admitted to circulating these letters to other attorneys, presumably settling parties, but apparently not to the objectors who these letters were aimed toward. Tr. PageID.64653.

While the Court evidently disagrees with Michael Pitt about the contours of its unrecorded *ex parte* communications, the ambiguity of the record is precisely why substantive conference should be recorded, and precisely why the Court cannot itself become witness to disputed *ex parte* proceedings without forfeiting all pretense of neutrality. Only discovery from the attendees can impartially recount the proceedings that excluded objectors.

The Hall Objectors appreciate and agree with the Court when it says that the rules "level the playing field among all lawyers." Tr. PageID.64642. Among those rules is Canon 3A(4) of the Code of Conduct for United States Judges, which provides that "a judge should not initiate, permit, or consider *ex parte* communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers." Here, the objectors have been systematically excluded from communications concerning their motions and objections, making it impossible for them to have as much "power and authority as

anyone else." Tr. PageID.64642. Perhaps these conferences were well-intentioned. Perhaps they started out as purely ministerial discussions. Whatever the reason, the now-disputed recollections of the *ex parte* conferences "break[] down" fairness between the parties "and there have to be consequences." *Id.*

To level the playing field and restore some semblance of compliance to Canon 3A(4), the Court should grant the Motion and direct the disclosure of "any conferences that were not held on the record" as the Court correctly understood the motion. ECF No. 1774, PageID.63638. Failure to do so abridges individual due process rights.

I. The Hall Objectors (and the joining plaintiffs) are parties with interests not represented by settling parties

Both oppositions claim that objectors were represented during the *ex parte* conferences by Class and Liaison Counsel, so the hearings were not *ex parte* at all. The Hall Objectors anticipated this argument, which falls flat because the interests of objectors clearly diverge from the settling parties. PageID.62803 (quoting *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013)). Objecting class members are separate and independent parties for purposes of resolving their objections. PageID.62806-07 (citing *Devlin v. Scardelletti*, 536 U.S. 1 (2002) and *Pearson v. Target Corp.*, 893 F.3d 980 (7th Cir. 2018)). The caustic tone of Liaison Counsel's brief makes clear how preposterous their argument is; objectors cannot be represented by people who oppose them.

The State Defendants imply that the Court's appointment of Class and Liaison Counsel allows it to discuss objectors' motions without a record and outside their presence. PageID.64591. But the Court never appointed counsel to usurp the roles of *all* individuals—such an order would deprive them of their rights. The Court's Order

Delineating the Duties appointed counsel to speak for the class and individual plaintiffs, a role qualified by the "**right** of any class member's or individual plaintiff's counsel to present non-repetitive individual or different positions." ECF No. 234, PageID.8723 (emphasis added). Moreover, in the process of objecting, class members must be "afforded the opportunity to represent [their] own best interests." *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010).

Liaison Counsel makes much of the fact that the Hall Objectors comprise three adults, but they say little about the joinder of the *Washington* and *Chapman* objectors, who together represent over 10,000 claimants.[3] For comparison, the current Mayor of Flint was elected with just over 7,000 votes. The Motion hardly reflects a fringe position.

II. Rule 77(b) does not permit the Court to conduct *ex parte* conferences on substantive matters while excluding parties with adverse interests.

Neither response cites any case where *parties to a motion* may be excluded from discussion directly pertaining to their pending motions. While the Court can certainly conduct ministerial conferences in-chambers, *ex parte* conferences occurred on March 1 and May 3 on motions by and about absent parties.[4]

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[3] For this reason, Liaison Counsel's attacks on HLLI are as irrelevant as they are baseless. *See* Declaration of M. Frank Bednarz in support of Motion ("Bednarz Decl.") ¶¶ 46-65 for further discussion of Liaison Counsel's irrelevant *ad hominem* attacks.

[4] Liaison Counsel incorrectly argues that the Motion "consistently stops short of actually calling the conferences *ex parte*" and suggests that this proves they aren't. PageID.64604 n.2. In fact, the Motion expresses uncertainly *in some places* because Hall Objectors did not previously know anything that transpired May 3. Objectors can now confidently say that both hearings were *ex parte*: "communication between counsel or a party and the court **when opposing counsel or party is not present.**" *Ex parte communication*, BLACK'S LAW DICTIONARY 337 (10th ed. 2014) (emphasis added).

Both responses analogize the closed-door proceedings to those that might occur following a consent decree, citing *B.H. v. McDonald*, 49 F.3d 294 (7th Cir. 1995) (denying access to non-parties). But here, the some of the objectors are parties that *object* to final approval. Upon final approval, the rights of tens of thousands of poisoned Flint adults will be extinguished against settling defendants, implicating due process rights. *McDonald* itself highlights a key distinction between consent decrees (implemented under auspices of court jurisdiction), and settlement agreements where once parties "utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements." *Id.* at 300 (quoting *Bank of American Nat. Trust v. Hotel Rittenhouse*, 800 F.2d 339, 345 (3d Cir. 1986)).

The distinction turns on a "court's exercise of its adjudicatory power." 49 F.3d at 300. The settling parties do not even pretend that the unrecorded March 1 proceedings could be anything but an exercise of adjudicatory power. The hearing plainly pertained to Class Counsel's *contested* motion on bone testing, and it concluded with an unexplained and inexplicable finding it was "noncompliant with the Court's practice guidelines as well as the duties of the counsel." ECF No. 1450, PageID.57092.

The record now also suggests the Court acted adjudicatively on May 3.[5] First, the Court inquired into facts underpinning the Order to Show Cause. Tr.

[5] The Court suggests the May 3 conference had nothing to do with attorneys Cuker or Washington, but the provenance of the Specht deposition transcript, which the Court discussed, is the precise topic of the Order to Show Cause. ECF No. 1718, PageID.62500 ("from whom, and when the *Chapman* Plaintiffs' counsel came into possession of the protected materials").

PageID.64652. Next, the Court directed Co-Lead Class Counsel Pitt to draft and send *ex parte* correspondence addressing pending objections. *Id.*; ECF No. 1789-7, PageID.64182 ("May 13 Letter"); Bednarz Decl., Ex. A. ("May 5 Letter").

The Court itself characterized the conference as enforcement, recalling that the May 3 conference was "not about" objectors, but because supposedly Michael Pitt "had taken a position contrary to [his] signature on the settlement and that raised deep concern." Tr. PageID.64645. Based on this, the Court took upon itself to enforce an interpretation of a settlement agreement that has not been finally approved. This removes the hearing entirely from the exception carved out by *McDonald* and into adjudicative enforcement. 49 F.3d at 300. The two letters together imply at least one further adjudicative *ex parte* communication: a directive for Michael Pitt to write the May 13 Letter to omit material covered in the May 5 Letter. Bednarz Decl. ¶¶ 13-14.

The Court did not deny directing Michael Pitt to write a letter, and the essential subject of the letters concerns the safety, reliability, and availability of bone lead testing, which are the core topics of numerous pending objections and motions. *See id.* ¶ 15. The May 13 letter *expressly addressed* "concerns raised by the objectors." ECF No. 1789-7, PageID.64182. Yet Hall Objectors did not receive a copy of either Court-solicited letter until May 24. *Id.* ¶¶ 3-5. Objectors may not have learned of the *ex parte* direction(s) to Pitt except that Liaison Counsel mistakenly filed the May 5 Letter, which the Court then removed from the record. *Id.* ¶¶ 16-30. Other conferences likely occurred. *Id.* ¶¶ 31-38.

Liaison Counsel cites cases for the proposition that *third parties* (media) may be excluded from sensitive conferences. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (testimony of minor); *United States v. Valenti*, 987 F.2d 708, 714 (11th

Cir. 1993) (ongoing investigations); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 598 (1980) (concurring in finding violation, so need not speculate "[w]hat countervailing interests might be sufficiently compelling to reverse this presumption of openness").

But none of these cases suggest that a *party* with adverse interests can be excluded from a hearing directly pertaining to the facts underpinning a pending motion.[6]

Liaison Counsel misrepresents sections of the *Manual for Complex Litigation*. In quoting "[c]onfidential discussions with judge" as one of the techniques a court may employ, they fail to contextualize that this suggestion is among the "Specific Techniques to Promote Settlement." § 13.13 at 169-70. The *Manual* notes that "creativity in this aspect of the litigation has few risks" presumably because settlement discussion are confidential anyway—it does not endorse closed-door factfinding that directly pertains to pending disputed motions this way. Liaison Counsel also blockquotes a passage that, among other things, cites 28 U.S.C. § 753(b) and notes "Rule 16 requires (and sound practice dictates) that all matters decided at pretrial conferences be memorialized on the record or in a written order." Here, the Court directed at least one party to submit a letter, yet this directive was never memorialized.[7]

CONCLUSION

Counsel for the objectors must be invited to future off-the-record conferences pertaining to the Settlement and are entitled to discovery concerning past proceedings.

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[6] *Rovinsky v. McKaskle*, arguably weighs in favor of the Motion. 722 F.2d 197, 201 (5th Cir. 1984) (hearing a motion "behind closed doors" compelled reversal).

[7] Neither response disputes the Motion's argument that the Hall Objectors are parties who may insist on recording proceedings pursuant to 28 U.S.C. § 753(b).

Dated: June 1, 2021

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system on June 1, 2021, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ M. Frank Bednarz
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