IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

Sylvester McClain, et al. Plaintiffs, v. Lufkin Industries, Inc. Defendant.	§ § § § § § § § § §	Civil Action No. 9:97 CV 063 (COBB)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS CLASS REPRESENTATIVES PATRICK ROSS, MARY THOMAS WILLIAMS, EDDIE MASK, LEROY GARNER, SHERRY CALLOWAY SWINT, WALTER BUTLER, CLARENCE OWENS, EARL POTTS, CLIFFORD DUIRDEN, AND ROALD MARK

I. INTRODUCTION

After five years, during which all of the Class Representatives have devoted their time, energy and active participation to this litigation, Defendant. Lufkin Industries, Inc. ("Lufkin" or "Defendant"), now seeks to dismiss ten of the Class Representatives,[1] alleging that these individuals have shown "no interest in this action." The *only* factual basis Lufkin claims for its motion is its assertion is that these Class Representatives did not attend the trial or other post-class certification hearings and, without presenting *any* evidence of harm to the class, Lufkin asks this Court to conclude that these Class Representatives are not adequately representing the class. Lufkin's Motion to Dismiss Class Representatives is just its latest attempt undermine this case from going forward as a class action, despite the Court's 1999 class certification order. On the merits, Lufkin's motion is specious. Neither the factual record in this case, applicable legal standards nor any of the cases Lufkin cites supports Lufkin's motion. The Court should deny Lufkin's motion as to each of these ten Class Representatives.

II. BACKGROUND

This case was originally filed by Named Plaintiffs Sylvester McClain and Buford Thomas. In March 1999, after a three day evidentiary hearing Plaintiffs' motion for class certification, the Court entered its Order Granting Motion to Certify Class Action, in which it noted that:

> … Lufkin argues at length against the adequacy of Sylvester McClain and Buford Thomas as class representatives. The court disagrees. The differences cited by defendant do not go to plaintiffs' suitability or capacity to manage this action. We find that the interests of the set of representative plaintiffs are common to and consistent with those of the class with respect to the litigation and resolution of this law suit. In addition the court has on file affidavits from seven additional class members who express their willingness to serve as class representatives. In the class certification hearing multiple witnesses also agreed, if called upon, to serve in that capacity. The court is firmly convinced that adequate class

[1] Specifically, Lufkin seeks to dismiss Class Representatives Patrick Ross, Mary Thomas Williams, Eddie Mask, Leroy Garner, Sherry Calloway Swint, Walter Butler, Clarence Owens, Earl Potts, Clifford Duirden, and Roald Mark. See Lufkin Motion to Dismiss Class Representatives at 1.

> representatives are both present in the suit and available to serve. The court has continuing authority and ongoing obligation to adjust the class to serve the interests of the class members. Should the appointment of additional class representatives benefit the class, the court will move to do so. .

McClain v. Lufkin Indust., Inc., 187 F.R.D. 267, 281 (E.D. Tex. 1999).

Subsequently, the Court entered an Order Designating Class Representatives, designating eleven class members as additional Class Representatives. See Dkt. #91. Each of the Class Representatives Lufkin now seeks to dismiss was so designated by the Court after he or she testified in person or by way of affidavit in connection with the class certification hearing the Court held.

III. ARGUMENT

The Fifth Circuit has determined that "the adequacy requirement [of Rule 23(a)] mandates an inquiry into . . . the willingness and ability of the representative[s] to take an active role in and control the litigation . . . ." Berger v. Compaq Computer Corp., 257 F.3d 475, 479 (5th Cir. 2001) (quoting Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 484 (5th Cir. 1982)). The purpose of the adequacy requirement is to protect the legal rights of absent class members, and "to ensure that the party is not simply lending his name to a suit controlled entirely by the class attorney." Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 727 (11th Cir. 1987) (quoting 7A Wright, Miller & Kane at § 1766 pp. 310-11).

"The task of defining the precise contours of Rule 23(a)'s adequacy requirement" is "largely left to the lower courts." Berger v. Compaq Computer Corp., 257 F.3d at 480 n.7, citing 7A Wright, Miller & Kane at § 1765, at 269 (2d ed.1986). The determination that a party would adequately protect the interests of the class is a question of fact that depends on the circumstances of each case. Guerine v. J & W Inv., Inc., 544 F.2d 863, 864-65 (5th Cir. 1977). Furthermore, a court's decision regarding the adequacy of a class representative will not be disturbed on appeal unless it is shown to be an abuse of that discretion. Patterson v. Gen. Motors Corp., 631 F.2d 476.

The courts have not established any "bright line" requirement regarding the degree of involvement in the lawsuit that is required of class representatives in order to fulfill their duty to

adequately represent the absent class members. See e.g., Kirkpatrick, 827 F.2d at 727 ("adequate class representation generally does not require that the named plaintiffs demonstrate to any particular degree that individually they will pursue with vigor the legal claims of the class."); In re Gaming Lottery Sec. Litig., 58 F. Supp. 2d 62, 76 (S.D.N.Y. 1999) ("The participation of plaintiffs in this case has not been so minimal as to indicate a virtual abdication to the attorneys of the conduct of the case . . . ."); Byes v. Telecheck Recovery Servs., Inc., 173 F.R.D. 421, 426 (E.D. La. 1997) ("A class representative is not required to understand the meaning of complex legal terms or to direct litigation strategies."); Ass'n. of Flight Attendants v. Texas Int'l Airlines, Inc., 89 F.R.D. 52, 61 (S.D. Tex. 1981) ("The named plaintiffs' lack of knowledge of . . . the conduct of the litigation is not relevant to the question of the adequacy of class representative.").

A. The Class Representatives have shown the willingness and ability to take an active role and control the litigation.

Lufkin contends that the ten Class Representatives it seeks to dismiss have shown "no interest in this action." This contention rests solely on Lufkin's assertion that these ten Class Representatives did not attend the trial or other post-class certification hearing proceedings Plaintiffs address the non-attendance argument below in § B. However, as a threshold matter, Plaintiffs note that the Court, in designating these individuals as Class Representatives, has already made an initial determination that they have the willingness and ability to take an active role in and control the litigation. Furthermore, Lufkin is in no position to assess the overall contributions and commitments these Class Representatives have made to the litigation since the Court designated them as class representatives, other than to point out that they did not attend the trial or mediation sessions, because Lufkin has not been privy to the interactions between these and the other Class Representatives and Class Counsel. Nevertheless, Lufkin leaps to the conclusion that since these Class Representatives did not attend the trial or the mediation sessions they, therefore, have not "shown interest in the case." Lufkin is wrong.

In fact, since being designated as Class Representatives, each of the Class Representatives Lufkin seeks to dismiss have willingly and integrally participated in the

litigation through telephone and in-person communications with Class Counsel, participating in discovery, providing documents and other information to Class Counsel and assisting Class Counsel in the formulation of positions on behalf of the class in the litigation and mediation.

The attached Declaration of Plaintiffs' counsel Mr. Garrigan, describes the extensive involvement and significant time commitment each of these Class Representatives has devoted to the case, and to assisting Class Counsel and protecting and representing the interests of the absent class members. *See* Declaration of Timothy B. Garrigan, Esq. ("Garrigan Decl.") at ¶ 4 (demonstrating that Class Representative Walter Butler participated in at least 13 phone calls with Class Counsel, 4 meetings with Class Counsel and other class representatives, and 4 individual meetings with Class Counsel; Class Representative Clifford Duirden participated in 19 phone calls with Class Counsel, 3 meetings with Class Counsel and other class representatives, and 8 individual meetings with Class Counsel; Class Representative Leroy Garner participated in 6 phone calls with Class Counsel, 4 meetings with Class Counsel and other class representatives, and 4 individual meetings with Class Counsel; Class Representative Roald Mark participated in 89 phone calls with Class Counsel, 6 meetings with Class Counsel and other class representatives, and 11 individual meetings with Class Counsel,; Class Representative Eddie Mask participated in 9 phone calls with Class Counsel, 5 meetings with Class Counsel and other class representatives, and 3 individual meetings with Class Counsel; Class Representative Clarence Owens participated in 15 phone calls with Class Counsel, 4 meetings with Class Counsel and other class representatives, and 3 individual meetings with Class Counsel; Class Representative Earl Potts participated in 89 phone calls with Class Counsel, 4 meetings with Class Counsel and other class representatives, and 4 individual meetings with Class Counsel; Class Representative Patrick Ross participated in 6 phone calls with Class Counsel, and 2 individual meetings with Class Counsel,; Class Representative Sherry Calloway Swint participated in 15 phone calls with Class Counsel, and 3 meetings with Class Counsel and other class representatives; and Class Representative Mary Williams Thomas participated in 21

phone calls with Class Counsel, 3 meetings with Class Counsel and other class representatives, and 4 individual meetings with Class Counsel).

Each of the Class Representatives Lufkin seeks to dismiss made himself or herself available for deposition during the discovery phase of this case and/or provided declarations and/or other assistance to Class Counsel during the mediation process. See Garrigan Decl. at ¶ 6.

Accordingly, Lufkin's blanket – and wholly unsupported – contention that the Class Representatives have shown "no interest in this action" is clearly refuted by the record.

B. The Class Representatives' absence from trial is not sufficient grounds for their dismissal.

Lufkin, nevertheless, argues that these ten Class Representatives have not adequately represented the class, because they "have not attended a hearing or trial" or "any of the mediation sessions." Motion to Dismiss Class Representatives at 3 and n.1. This is the *sole* basis on which Lufkin claims these Class Representatives have failed to adequately represent the class. Significantly, Lufkin does not identify in what way the class has been harmed by these Class Representatives' non-attendance at trial or the mediation sessions.

Moreover, Lufkin ignores that Plaintiffs Sylvester McClain and Bufford Thomas attended every day of trial, that Class Representative Florine Thompson also attended the trial and testified on the class' behalf, that Mr. McClain attended every day and Ms. Thompson attended many of the mediation sessions conducted by the private mediator and Mr. McClain, Ms. Thompson and Mr. Thomas all attended the mediation session conducted by Magistrate Judge Radford. See Garrigan Decl. at ¶¶ 8-9. Without question, the class was well-represented at the trial and during the mediation.

Furthermore, contrary to Lufkin's implication, there is no absolute rule that the non-attendance of a class representative at a hearing or trial, at which his attendance was not compelled by subpoena or otherwise, alone renders that individual inadequate to serve as a class representative. Nor does Federal Rule of Civil Procedure 24(a)'s adequacy requirement mandate that every class representative attend every court hearing or mediation sessions.

Most significantly, the authorities Lufkin relies on do not support its contention that courts have found class representatives to be inadequate based *solely* on their failure to attend trial or hearings. Each of the authorities Lufkin cites for this proposition involved circumstances far different from the case at bar. More importantly, in each case relied on by Lufkin, the determining factor in the court's decision was not that the putative class representative did not attend trial or a hearing, but some other conduct or information in conjunction with the non-attendance that resulted in harm to the class. Thus, based on the facts and record in this case, Lufkin cannot meet the threshold standard set by the cases on which it relies.

For example, in Goldchip Funding Co. v. 20th Cent. Corp., 61 F.R.D. 592 (M.D. Pa. 1974), the court, in determining whether the putative class representatives would adequately represent the securities fraud class, noted that the only facts available to the court to make this determination, were that one plaintiff was a housewife and the other was a student, neither had business experience or knowledge of the facts, both were relying upon their attorneys, and neither had attended any of the three hearings held in the case. Id. at 595. The court concluded that these limited facts did not provide the court with sufficient information to determine whether the proposed class representatives would adequately represent the class. The court therefore denied the motion to certify the class without prejudice, and expressly held that the plaintiffs might still be able to demonstrate "a keen interest in the progress and outcome of the litigation" sufficient to meet the requirements of Rule 23, but they had not thus far. Id.

Unlike in Goldchip, this Court had ample information from and about the Class Representatives, prior to their designation as class representatives, to determine whether their presence in the case would "benefit the class" and that they would be adequate representatives of the class. See McClain, 187 F.R.D. at 281. Moreover, in Goldship, the plaintiffs' failure to attend three hearings was just one of several factors the court cited in determining it had insufficient information to find that the plaintiffs could adequately represent the class. Here, Lufkin does not argue that the Class Representatives are inadequate on any basis other than the fact that they did not attend the trial or post-class certification hearings. This fact alone,

particularly when assessed in light of other information regarding these Class Representatives' extensive participation in assisting Class Counsel throughout the litigation and mediation phases of this case and the presence of other Class Representatives at trial and the mediation sessions, fails to justify the harsh and unnecessary relief Lufkin seeks.

Weikel v. Tower Semiconductor Ltd., 183 F.R.D. 377 (D. N.J. 1998), on which Lufkin also relies, is equally distinguishable. In Weikel, the court dismissed a class representative who stated at the class certification stage that he would need advance notice of six or seven weeks in order to arrange his schedule to participate in the trial. See id. at 396. The court, in ruling that this class representative could not adequately represent the class, found that "[i]t would be inappropriate to subject class members to trial delays created by a class representative." Id.

In contrast, the trial in this matter was not affected by the Class Representatives' non-attendance. In fact, Lufkin did not even file its motion until the sixth day of the eight day trial and a year and a half after the parties' final mediation session. See Garrigan Decl. at ¶ 13. Moreover, Lufkin fails to articulate, other than in conclusory and non-specific terms, how the class has been or could be harmed by the absence of these particular Class Representatives at trial and the mediation sessions, particularly given other Class Representatives' attendance at these proceedings.

Furthermore, unlike in Weikel, none of these Class Representatives stated that he or she was unavailable or unwilling to attend trial or sought to delay trial because of his or her personal schedule. On the contrary, when specifically asked in their depositions, several Class Representatives affirmatively testified that, should it be necessary, they would be willing to testify at trial. See, e.g., Deposition of Eddie Mask at p. 196; Deposition of Walter Butler at p. 244. In fact, one of the Class Representatives whom Defendant seeks to dismiss, Walter Butler, was subpoenaed by Lufkin to testify at trial, prepared and arrived for court on the day on which

he was scheduled to be examined, but Lufkin ultimately did not call him to testify.[2] See Garrigan Decl. at ¶ 12.

Lufkin also cites Gill v. Monroe County Dep't of Soc. Servs., 92 F.R.D. 14 (W.D.N.Y. 1981) and Lenora v. Koller Die & Tool Co., Inc., No. 77-C-760 1978, WL 200 (E.D. Wis. July 31, 1978), as cases where class representatives were dismissed due to a demonstrated lack of interest in the litigation. However, in neither case did the courts rely solely on the class representatives' non-attendance in court, but instead on demonstrated showing of harm to the class, in dismissing class representatives. Specifically in Gill, the class representative failed to respond to the court's order to show cause and failed to take any action when it was apparent that class counsel was not fulfilling his duties to the class. Gill, 92 F.R.D. at 16. In Lenora, the class representative twice failed to appear for his scheduled deposition, despite adequate notice and efforts by his counsel. 1978 WL 200 at *1. By comparison, in this case, each of these Class Representatives appeared for their depositions, and have been willing and committed to assist Class Counsel in the prosecution of this case and the protection of the absent class members' rights throughout the five years since they were designated Class Representatives by the Court.[3]

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[2] Moreover, all of the Class Representatives were designated as trial witnesses by Lufkin and the parties agreed that the Class Representatives would attend trial on the day for which they were subpoenaed, but they would not otherwise attend. See Exhibit C, Letter from Christopher Bacon, September 27, 2004 (stating that the Class Representatives who were to be called by Lufkin at trial would be subpoenaed, and explicitly noting that they need not attend trial prior to the day of their examination).

[3] Other authorities confirm that, as in Gill and Lenora, courts finding sufficient grounds for dismissal of class representatives have relied on egregious relegations of the representatives' responsibilities that simply are not present in this case, nor alleged by Lufkin. See, e.g., Krim v. Pc Order.com, Inc., 210 F.R.D. 581, 588-89 (W.D. Tex. 2002) (denying proposed class representatives who had gained the vast majority of their knowledge of the case from their own attorneys in the few weeks between their depositions and the hearing, who had participated in very few phone calls, and who had little to no understanding of their role as class representatives); Scott v. New York City Dist. Council of Carpenters Pension Plan, No. 02 CV 3655 2004 WL 2367139, at *2-*3 (S.D.N.Y. Oct. 21, 2004) (denying a proposed class representative who showed an "alarming lack of familiarity with the suit, as well as little or nonexistent knowledge of their role as class representatives," who had personally met with counsel only once in the three years prior to the deposition, and who was unsure what the lawsuit

(continued . . .)

In summary, none of the case Lufkin cites supports its position. Moreover, Lufkin's position, that the "adequacy of representation" standard requires each Class Representative to attend all hearings and trial, is neither practical nor necessarily in the best interests of the class.[4] It is certainly reasonable and not harmful to the interests of the class for the Class Representatives, in consultation with their counsel, to make decisions about which of the Class Representatives could and would attend a hearing, settlement meeting or trial, and what contributions to the prosecution of the case and representation of the absent class members the other Class Representatives make. This is especially so where, as here, there are thirteen Class Representatives, most of whom are employed full-time and reside considerable distances from where the trial, other hearings and mediation sessions were held. See Garrigan Decl. at ¶ 7. That these Class Representatives did not take time off of work to attend trial when their presence was not required does not, as Lufkin contends, in and of itself, render them inadequate class representatives.[5] Furthermore, Class Counsel was in constant contact with all of the Class Representatives in planning strategy, gathering information and checking facts throughout the litigation and mediation. See Garrigan Decl. at ¶¶ 2, 6.

Lufkin's contention that the Class Representatives are inadequately representing the class based solely on the fact that the Class Representatives did not attend the trial and mediation sessions is groundless.

(continued …)
even concerned.).

[4] For example, Lufkin's implicit suggestion that all thirteen of the Class Representatives should have participated in the more than 20 mediation sessions, is both impractical and would have a chilling effect on individuals willing to come forward and serve as class representatives.

[5] Lufkin refused to give Class Representatives who are still employed by Lufkin time off from work with pay to attend the trial. See Garrigan Decl. at ¶ 10.

IV. CONCLUSION

For all of the foregoing reasons, the Court should deny Lufkin's motion to dismiss Class Representatives Patrick Ross, Mary Thomas Williams, Eddie Mask, Leroy Garner, Sherry Calloway Swint, Walter Butler, Clarence Owens, Earl Potts, Clifford Duirden, and Roald Mark.

Dated: November 30, 2004

Respectfully submitted,

By: /S/

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CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing by sending same via electronic filing to:

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/S/
Teresa Demchak