H(2375)83

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 72-100-C(4)
	)	
BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MISSOURI, et al.,	)	
	)	
Defendants.	)	

ROCKWOOD SCHOOL DISTRICT'S BRIEF IN SUPPORT OF ITS RIGHT TO PARTICIPATE IN FAIRNESS HEARING

Comes Now Defendant Rockwood School District, by and through counsel, and pursuant to this Court's directive of April 29, 1983, submits the following Brief in support of its request that, on May 13, 1983, or as soon thereafter as it can be heard, it be given the opportunity to give a brief opening statement, and submit evidence on the the Settlement Agreement as it relates to Rockwood School District.

I.

INTRODUCTION

Defendant Rockwood School District (hereinafter "Rockwood") seeks this Court's permission to give a brief opening statement, call one witness and possibly introduce three exhibits, all of which should take no more than twenty minutes of this Court's time. Rockwood is one of seven school district defendants for which no stay of Plaintiff's interdistrict claims has been entered. Therefore, Rockwood is an active litigant subject to

immediate trial and vitally interested in the Settlement Agreement. Rockwood has accepted the Settlement Agreement, with understandings which it believes may bear on the fairness, reasonableness and adequacy of the Settlement Agreement as it pertains to Rockwood.

In this Court's Order H(2276)83 notice was given that a fairness hearing would be held at which time "all interested persons will have the opportunity to be heard." The Court directed such interested persons to file a notice of intent to appear and position statement, the same to be filed with the Court and mailed to all parties and persons on the Court's mailing list. Rockwood filed its notice of intent to appear and position statement on April 25, 1983 and the same was mailed to all persons and parties on the Court's mailing list. This Court further directed all parties to submit witness and exhibit lists on or before April 25, 1983 (H(2278)83). Rockwood has fully complied with this directive (H(2333)83). Therefore, Rockwood has complied with all of this Court's requirements with respect to perfecting its right to be heard.

It should be noted that Rockwood is not seeking modification of the plan. Indeed, the Court cannot modify the terms of a desegregation proposal; it can only accept or reject the proposal as presented to it. Armstrong v. Board of School Directors of City of Milwaukee, 471 F.Supp. 800, 804 (E.D.Wisc. 1979), aff'd.

616 F.2d 305 (7th Cir. 1980); Plummer v. Chemical Bank, 668 F.2d 654 (2nd Cir. 1982); In Re General Motors Engine Interchange Litigation, 594 F.2d 1106, 1125 n. 24 (7th Cir.), cert. den. 444 U.S. 870 (1979). Rockwood merely wishes to introduce evidence of time and distance factors unique to Rockwood that will affect its ability to meet its plan ratio and plan goal within the time prescribed in the Settlement Agreement, and that the understandings expressed in its acceptance of the Settlement Agreement are reasonable.

If Rockwood through no fault of its own does not meet its plan ratio after more than seven years, it is only fair and reasonable that it be allowed to terminate its obligations under the plan for good cause shown to this Court. Otherwise, Plaintiffs could sue Rockwood on their interdistrict claims and at the same time insist on (and judicially enforce) Rockwood's continued compliance with the terms of the settlement agreement in perpetuity. Plaintiffs would not be prejudiced, by such termination, because under the Agreement they would have been required to reinstitute their interdistrict claims in any event within two years after the Monitor's Report is filed with the Court.

Rockwood's position regarding termination of obligations would not require that the agreement be modified, as the agreement does not address the issue. Rockwood believes that this Court has the authority and the duty to approve a plan of reasonable duration. Rockwood's good faith attempts for seven

years to reach its ratio and goal should entitle it thereafter at least to be able to show the Court why its obligation should terminate. See Armstrong v. Board of School Directors of City of Milwaukee, supra, 471 F.Supp. at 818, wherein the Court approved a desegregation agreement of five years duration, which agreement provided for a dismissal of the litigation with prejudice after the five year period.

II.

ROCKWOOD SCHOOL DISTRICT AS A PARTY DEFENDANT SHOULD BE GRANTED LEAVE TO GIVE AN OPENING STATEMENT, EXAMINE WITNESSES AND SUBMIT EVIDENCE ON THE FAIRNESS OF THE SETTLEMENT AGREEMENT PURSUANT TO RULE 23(e)

It has frequently been stated that the goal of Rule 23(e) Fairness Hearing is "to adduce all information necessary to enable the judge intelligently to rule on whether the proposed settlement is 'fair, reasonable, and adequate.'" Armstrong v. Board of School Directors of City of Milwaukee, 616 F.2d 305, 314 (7th Cir. 1980); Manual For Complex Litigation Section 146 at 57. Furthermore, case law suggests that a District Court should prior to making its decision to accept or reject a settlement proposal, permit a broad range of evidence to be adduced in order for the Court to make a reasoned and fair decision. In Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975), citing Glicken v. Bradford, 35 F.R.D. 144, 148 (S.D.N.Y. 1964), the Court commented on the breadth of relevancy at a settlement hearing when it stated "the test of the evidence which the Court should receive

on a settlement is whether the proffered proof is of a nature which will aid it in passing upon the essential fairness and equity of the settlement." Thus, the Court must endeavor to hear all points of view on the settlement in order to be in a position to approve or disapprove of the settlement, as it must be satisfied that the settlement is fair, reasonable, and adequate. Armstrong v. Board of School Directors of City of Milwaukee, 471 F.Supp at 800, 803 (E.D.Wisc. 1979), aff'd, 616 F.2d 305 (7th Cir. 1980).

Rockwood submits that its request to give a brief opening statement and call one witness to testify is reasonable and mandatory given its status as a party defendant in this litigation Rockwood is entitled to the opportunity, as a party defendant, to call and examine witnesses and to submit evidence on the fairness of the settlement agreement. Basic fairness and minimum due process standards require such opportunity. While a Rule 23(e) hearing is not a trial on the merits, when material facts concerning the existence of an agreement to settle a judicial contest are in dispute, the entry of an order enforcing an alleged settlement agreement pursuant to 23(e) without a plenary hearing is improper and is grounds for remand by the appellate Court. Calhoun v. Cook, 487 F.2d 680, 682 (5th Cir. 1973), citing Massachusetts v. Foreman, 469 F.2d 259 (5th Cir. 1972).

In Calhoun, a case wherein the District Court had approved a desegregation settlement agreement, the District Court did not permit discovery pursuant to Rule 23(e) and only allowed "all interested parties" to appear and make unsworn comments on the plan. Attempts to obtain discovery and introduce evidence at the Rule 23(e) hearing were denied by the District Court. The Fifth Circuit on appeal held that when considering a desegregation settlement under Rule 23(e):

> A reasonable opportunity for discovery must be afforded. In addition, minimum procedural due process requires adequate notice of a hearing at which an opportunity will be afforded the parties to present sworn testimony and to cross-examine witnesses who sponsor opposing views. [Emphasis added.]

Calhoun, supra, 487 F.2d at 683. The Fifth Circuit remanded Calhoun to the District Court to hear further evidence on the plan. Rockwood submits that implicit in the right to present evidence is the right to make an opening statement to the Court outlining what its evidence will establish.

In Flinn v. FMC Corp., supra, the District Court approved a settlement in a class action sex discrimination case. The Fourth Circuit held that a District Court at a fairness hearing should extend to anyone objecting to the settlment leave to be heard, to examine witnesses and to submit evidence on the fairness of the settlement. The Second Circuit, in Plummer v. Chemical Bank, 668 F.2d 654, 656 (2nd Cir. 1982), wherein an employment

discrimination class action settlement was at issue, recognized the merits of allowing both "objectors" and "proponents" an opportunity to establish evidentiary matters relevant to the fairness of the settlement agreement. In the instant case, Rockwood considers that it is a proponent of the Settlement Agreement, but wishes to adduce relevant testimony which may bear upon an ultimate end to the litigation as it relates to Rockwood. Regardless of how Rockwood's position is characterized, it should be afforded an opportunity as a party defendant to be heard at the Rule 23(e) fairness hearing. Indeed, the City Board in their "acceptance" (H(2252)83) adopted the plan as a settlement agreement "it being understood that under paragraph X, A of the settlement agreement the fulfillment of the obligations of the parties is contingent upon an order by the Court which establishes adequate funding for the obligations of the parties, consistent with the agreement in principal and this settlement agreement." The Liddell Plaintiffs accepted the settlement with the understanding that the agreement was "subject to the Court's determination of its constitutionality and adequate funding." (H(2247)83) Furthermore, the United States neither accepted nor rejected the entire settlement agreement. Nonetheless, this Court has permitted the City Board, Liddell and the United States the opportunity to give opening statements, introduce evidence and cross-examine witnesses. In addition, exhibits or testimony

have been adduced by Riverview Gardens and Maplewood-Richmond Heights school districts concerning their particular circumstances, and exhibits have been introduced by Parkway School District.

The Court has, quite properly, permitted not only the parties to the litigation but also non-parties to make statements and present evidence. Certainly in a matter as complex and involving as many critical issues as are here before the Court, the Court should benefit from receiving all relevant testimony concerning the fairness of the Settlement Agreement as to all parties. Rockwood submits that not only as a matter of right should it be permitted to be heard, but also that its presentation will clearly be in the public interest.

Respectfully submitted,

BRACKMAN, COPELAND, OETTING,
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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was mailed first class, postage prepaid, to the attorneys of record and all other parties included on the Court's mailing list this 6th day of May, 1983.

Robert W. Copeland Jr.