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.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO ROCKWOOD AND MEHLVILLE'S PARTICIPATION IN FAIRNESS HEARING

On April 29, 1983, counsel for Rockwood and Mehlville requested time to present oral argument and witnesses at the fairness hearing. Plaintiffs objected, and the Court ordered the parties to file legal memoranda by May 6.

Rockwood and Mehlville are not signatories to the settlement agreement. Although they advised the Court that they would accept the agreement, they imposed conditions that are inconsistent with the Agreement in principle and unacceptable to the parties. The courts have consistently held that defendants who, like Mehlville and Rockwood, refuse to join in settlement of a class action, are not parties to or bound by the agreement, and therefore have no standing to object to its terms. See, e.g., In Re Nissan Motor Corporation Antitrust Litigation, 552 F.2d 1088, 1103 n.17 (5th Cir. 1977); Newberg on Class Actions

§ 5660b at 564-65 (1977) ("[N]on-settling defendants in a partial settlement have no standing to object to the fairness or adequacy of the settlement. . . .")*/ Accordingly, a court conducting a Rule 23(e) fairness hearing will not consider the objections of non-settling defendants. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1797 at 197 (1983 Supp.).

In their pre-hearing memoranda, Mehlville and Rockwood argue that their conditions should be included in the settlement agreement. This hearing, however, is not the appropriate forum for such arguments. This hearing is not a negotiating session. It addresses whether the settlement is fair, reasonable and adequate. E.g., Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), cert. denied, 423 U.S. 864 (1975); 3B Moore's Federal Practice ¶ 23-80[4] at 23-520

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*/ Accord, e.g., In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979) cert. denied sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigation Ass'n., 452 U.S. 965 (1981); In re Ampicillin Antitrust Litigation, 82 F.R.D. 652, 654-55 (D.D.C. 1979); Seiffer v. Topsy's International, Inc., 70 F.R.D. 622, 627 & n.5, 631 n.11 (D. Kan. 1976); Wainwright v. Kraftco Corp., 53 F.R.D. 78 (N.D. Ga. 1971); Philadelphia Electric Co. v. Anaconda American Brass Co., 42 F.R.D. 324, 326 n.1 (E.D. Pa. 1967). See also In re Fine Paper Litigation, 632 F.2d 1081, 1087 (3d Cir. 1980) (general rule is that a non-settling party may not object to the terms of a settlement which do not affect its own rights); accord, Weightwatchers of Philadelphia, Inc. v. Weightwatchers International, Inc., 455 F.2d 770 (2d Cir. 1972).

(1982-1983 cum. supp.). The Court's determination is to be based on the plan the parties negotiated, not one which Mehlville and Rockwood wish they had negotiated. Even the Court should not substitute its judgment as to the best obtainable terms for that of the parties. Armstrong, supra, 616 F.2d at 315. Still less should it consider the views of parties who not only refuse to join with the others in ending the controversy, but seek to thwart a negotiated resolution of the latter's disputes. In light of the "overriding public interest in favor of settlement in class action suits," Ross v. Saltmarsh, 500 F. Supp. 935, 944 (S.D.N.Y. 1980); accord, Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976), the Court is entirely justified in focusing on the arguments of the affected parties, and not those of onlookers such as Mehlville and Rockwood, whose interests are merely vicarious.

Their participation in this hearing is equally inappropriate if their purpose is to argue that the agreement is not fair or reasonable to Rockwood and Mehlville. As demonstrated above, the question of fairness and reasonablness is directed to the members of plaintiffs' class. E.g., Seiffer v. Topsy's International, Inc., 70 F.R.D. 622, 627 (D. Kan. 1976). That class does not include the Rockwood and Mehlville School Boards or Districts.

Thus, plaintiffs suggest that Rockwood and Mehlville have three courses of action available to them:

- They may sign the agreement unconditionally, in which case they are free to participate in the hearing as proponents.

- They may pursue their conditions, but the appropriate channel is through continued negotiations with the signatories to the agreement.

- They may choose not to sign the agreement, in which case plaintiffs are prepared to pursue their interdistrict claims against Rockwood and Mehlville.

What they cannot do, however, is appear at these hearings for the purpose of opposing a plan they have not signed or of seeking Court approval of conditions they are unable to obtain through negotiations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Opposition was mailed this 6th day of May, 1983 by prepaid United States Mail to All Counsel of Record.

Kenneth C. Baxter