UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: June 25, 2021

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Re: Case No. 21-2655*, In re: Raymond Hall, et al*
Originating Case No. : 5:16-cv-10444

Dear Counsel,

The petition for writ of mandamus or prohibition has been docketed as case number **21-2655** with the caption listed above. If you have not already done so, you must mail a copy of the petition to the lower court judge and counsel for all the other parties.

Counsel for petitioner must file an Appearance of Counsel form and, if not admitted, apply for admission to the 6th Circuit Bar by **July 9, 2021**. The forms are available on the court's website.

The district court judge to whom this petition refers has been served with this letter.

Sincerely yours,

s/Ryan E. Orme
Case Manager
Direct Dial No. 513-564-7079

cc: Ms. Kinikia D. Essix

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21- ____

In re RAYMOND HALL, *et al.*

Petitioners/Objectors

From the United States District Court
For the Eastern District of Michigan,
No. 5:16-cv-10444-JEL-MKM
Hon. Judith E. Levy

Petition for Writ of Mandamus

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Corporate Disclosures

Under 6th Cir. R. 26.1, Petitioners Raymond Hall, Robert Hempel, Ashley Jankowiak, Lawrence A. Reynolds, Shamiya Chapman, Dorothy Chapman, Helen Chapman, Elizabeth Franklin, and Lashonda Jones make the following disclosures:

1. No petitioner is a subsidiary or affiliate of a publicly owned corporation.
2. There is no publicly owned corporation, not a party to the appeal, that has a significant financial interest in the outcome.

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Statement in Support of Oral Argument

As 6th Cir. R. 34 permits, petitioners suggest that oral argument may aid the decisional process given the significant and novel issues of class action procedure presented by this petition, and the fact that the public interest firm representing the Hall petitioners has "develop[ed] the expertise to spot settlement provisions and attorneys' fees." *See, e.g.,* Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 55-57 & n.37 (2018); *In re Dry Max Pampers Litig.,* 724 F.3d 713, 716-17 (6th Cir. 2013) ("*Pampers*") (sustaining the Center for Class Action Fairness's client's "numerous, detailed, and substantive" objection to settlement approval). A favorable resolution here stands to improve the class action process and authoritatively settle an important question on the rights of class action objectors.

That said, argument may not be practical. The district court will hold the settlement fairness hearing on July 12-15, 2021, and the accompanying need for relief from this Court is urgent. With each day that passes, the district court could hold more *ex parte* hearings with settling counsel, and could continue to instruct them in the defense of the contested motions for approval of settlement and attorneys' fees.

Jurisdictional Statement

This Petition arises from an Order[1] issued by Judge Judith E. Levy in *Carthan v. Snyder*, No. 16-cv-10444, the lead case in the Flint Water Cases pending in the Eastern District of Michigan. This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), through Fed. R. App. P. 21. The court below has federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343 and diversity jurisdiction under 28 U.S.C. § 1332(d)(2)(A). Fourth Consolidated Amended Class Complaint ("Complaint"), RE 620-3, PageID ##17808-09.

Petitioners are Dr. Lawrence A. Reynolds; Shamiya Chapman, Dorothy Chapman, Helen Chapman, Elizabeth Franklin, and Lashonda Jones ("Chapman Plaintiffs"); and Raymond Hall, Robert Hempel, Ashley Jankowiak ("Hall Objectors"). The Chapman Plaintiffs and Hall Objectors filed timely objections to a proposed mass and class action settlement and to the attorneys' fees award respectively. RE 1436, 1478, 1534, 1536-1538, 1548.[2]

[1] That order (RE 1830) is attached as Exhibit A. The on-the-record portion of the March 1, 2021 hearing (RE 1450) is Exhibit B. The letters that the district court instructed Class Counsel to write following the off-the-record May 3 conference are Exhibits C&D. Excerpts of the transcript from the May 26 conference (RE 1800), where these were discussed, is Exhibit E.

[2] The objections differ; Hall Objectors take no position on final approval of the settlement itself. Chapman Plaintiffs do not oppose fees requested by Class Counsel. Petitioners are united, however, in their position that they not be excluded from proceedings that concern their objections, motions, and attorneys.

Petitioners are parties for the purpose of pursuing objections and any subsequent appeals, without needing to intervene formally. *Devlin v. Scardelletti,* 536 U.S. 1 (2002). The individual Chapman and Reynolds Plaintiffs are parties to their own actions coordinated before the district court in the lead action (*i.e.* Case Nos. 5:17-cv-13890-JEL-MKM, 5:18-cv-10679-JEL-MKM (E.D. Mich.)), and as registrants they are bound by the settlement like class members, so are "parties to the proceedings in the sense of being bound by the settlement." *Devlin*, 536 U.S. at 10.

Statement of the Issues

1. Under Canon 3A(4) of the Code of Conduct for United States Judges, *ex parte* communications between judges and litigants on substantive matters are, with few exceptions, impermissible. Non-named plaintiffs like petitioners are parties for the purpose of objecting to and appealing class-action settlements and fee awards. *Devlin*, 536 U.S. at 7; *Fidel v. Farley*, 534 F.3d 508, 512-13 (6th Cir. 2008).

(a) Did the district court abuse its discretion in holding off-the-record, unnoticed, and *ex parte* conferences with counsel for the settling parties while excluding counsel for the petitioning objectors, even though the conferences addressed substantive matters related to petitioners' motions and objections?

(b) Did the court disregard the Federal Rules, and the Code of Judicial Conduct in denying with prejudice petitioners' motion to permit them to attend any future conferences and for an on-the-record reconstruction of previous *ex parte* meetings?

2. Due process demands that judicial officers serve as neutral arbiters when adjudicating cases, trials, or contested motions. *Anderson v. Sheppard.*, 856 F.2d 741, 745-47 (6th Cir. 1988). Judges may not depart that role to instead take "an active role in assisting [a litigant] in presenting its case and in proving [its] contentions." *Knapp v. Kinsley*, 232 F.2d 458, 464 (6th Cir. 1956). Nor may they "advocat[e] for [their] desired result." *In re United States*, 572 F.3d 301, 311 (7th Cir. 2009).

(a) Did the court abuse its discretion by,

(i) at an *ex parte* conference on March 1, 2021, pressuring Class Counsel into withdrawing a motion that sought to protect absent class members from X-ray fluorescence (XRF) bone lead testing using portable industrial scanners, a controversial aspect of the settlement; and

(ii) at an *ex parte* conference on May 3, 2021, directing co-lead class counsel Michael Pitt to write a letter to the court expressing his support for bone scanning, and by subsequently instructing Pitt *ex parte* to submit a revised letter more unequivocally favorable toward XRF testing?

(b) Should the district court be enjoined from further directing the litigation strategy and advocacy of Class Counsel in support of the settlement?

Statement of the Case

A. The Settlement.

The proposed Master Settlement Agreement ("Settlement") pending before the district court resolves claims against several defendants in the Flint Water Cases. Flint water users filed numerous individual and putative class actions after Flint's water supply in 2014-15 was switched from Detroit Water and Sewerage to the Flint River, a more caustic source that was not adequately treated for corrosion control. Complaint, PageID #17858. Lead from pipes consequentially leached into Flint tap water. Ingested lead is dangerous, and exposure often causes lifelong developmental problems for children exposed to it. *Id.* PageID #17907-11.

Class cases were consolidated in the docket below under co-lead class counsel Theodore Leopold of Cohen Milstein Sellers & Toll PLLC and Michael Pitt of Pitt McGehee Palmer & Rivers PC ("Class Counsel"). RE 173.

The court entrusted settlement-negotiating authority for individual plaintiffs to Corey Stern of Levy Konigsberg LLP and Hunter Shkolnik of Napoli Shkolnik PLLC ("Liaison Counsel"), ordering them to "[k]eep the other plaintiffs' counsel advised…consult them about decisions significantly affecting their clients" and "act fairly, efficiently and economically in the interests of all parties and party counsel." RE 234, PageID ##8725-26.

These attorneys reached a $643.25 million settlement with Michigan defendants and three other groups of defendants. RE 1394-2 (Settlement). Litigation continues against other defendants.

The Settlement blends class and mass action elements. It will waive the claims of adult class members who did not register by the March 29 deadline. *Id.*, PageID #54141. Tens of thousands of class members will release their claims against the settling defendants for nothing upon final approval.

The settlement also provides benefits for individuals excluded from the class definition, including all Flint residents first exposed to the water as children. Minor children—to whom 79.5% of settlement benefits are directed—may continue to claim from a holdback fund until it is exhausted, and do not waive their rights until they register. *Id.*, PageID #54149; RE 1319-2 ("Required Proofs Grid"), PageID ##40788-831. Individual plaintiffs are not class members, but may file a claim and will be bound if they register. All petitioners are Settlement registrants.

B. XRF bone testing.

The Settlement pays more to claimants who can prove exposure to lead, but most Flint residents do not have 2014-16 blood lead documentation. RE 1341, PageID #41818. Most claimants' only hope to obtain more money under the Settlement is from XRF bone lead testing, which purports to approximate historical lead exposure. XRF works by exposing the shins of Flint residents to ionizing radiation, X-rays. XRF devices measure secondary radiation emitted from the irradiated material, wavelengths of which are characteristic of specific elements like lead. RE 1255-5, PageID #39426 (describing typical use of the technique to test for contaminated soil or paint).

Under the Settlement, minor children with XRF bone test results receive 233%-1233% more (up to tens of thousands of dollars more) than children without test

results. *See* Required Proofs Grid, PageID ##40790-801. For example, minor children under the age of six without test results are entitled to 0.15x of a share from the under-six fund, a claim worth perhaps $6000.[3] *Id.*, PageID #40801. But a bone lead result of only 0.1 μg/G entitles the same child to a payment over three times as large (0.5x), perhaps $20,000. *Id.*, PageID #40798. An XRF reading of 0.1 μg/G appears to be much smaller than the margin of error of published portable XRF measurements. RE 1341, PageID #41911. Thus, child claimants will either uniformly or randomly receive 0.5x shares—more than triple the amount of class members without test results—simply by obtaining bone scanning. For the highest bone test readings, claimants receive 2x shares, perhaps $80,000 or more.

Bone testing is valuable under the settlement, and Liaison Counsel secured a monopoly on that process. Liaison Counsel already tested over 3,000 of its clients by October 2020, before the public even knew XRF bone scanning would be part of the Settlement. *See* Case No. 5:17-cv-10164-JEL-MKM, RE 343, PageID #21600. In December, the Chapman Plaintiffs objected to preliminary approval based on the limited availability of XRF bone testing. The court overruled the objection because "Class Counsel are working to set up a bone scan program, which would render this issue moot." RE 1399, PageID #54458. But Class Counsel could not set up a rival bone test clinic before the April 27 deadline to complete testing because, *inter alia*, Liaison Counsel stonewalled their experts (RE 1497), thus preserving Liaison Counsel's

[3] Though the proportions between the claim amounts are fixed, the ultimate payout values depend on the number and value of valid claims.

monopoly on valuable testing.[4]

Liaison Counsel allowed only three hours of fifteen-minute appointments to be scheduled on Sundays from February 21 until April 25, 2021—fewer than perhaps 120 appointments for the around 80,000 Flint residents not represented by Liaison Counsel.[5] Enhanced payouts for Liaison Counsel's clients dilute the shares paid to other unscanned claimants.

C. Dr. Reynolds' objection and Class Counsel's motion to halt bone testing.

On February 26, 2021, petitioner Dr. Lawrence Reynolds, a pediatrician and member of the Flint Water Advisory Task Force, filed a 25-page objection with 600 pages of exhibits challenging safety and legality of XRF bone testing. RE 1436. Dr. Reynolds observed that manufacturers of portable XRF devices warn they should never be pointed at body parts, that their use would require clearance by an Institutional Review Board (IRB), and that Napoli had never obtained license to operate such a device out of its law office. The device manufacturer, Thermo Scientific, later echoed

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[4] As co-liaison counsel Napoli wrote to the manufacturer of the portable XRF device in response to a letter demanding that Napoli stop using it on humans, there is "**no reasonable alternative means** of obtaining the lead measurement data." RE 1825-2, PageID #65147 (emphasis added).

[5] *See* Ron Fonger, *Attorneys pull request to stop bone lead testing in Flint water settlement without explanation* (Mar. 3, 2021), https://www.mlive.com/news/flint/2021/03/attorneys-pull-request-to-stop-bone-lead-testing-in-flint-water-settlement-without-explanation.html ("Less than one day after the link was posted online, every available time slot was completely taken.").

these concerns and asked Napoli to cease XRF testing on humans. ER 1825-2, PageID #65137.[6]

On March 1, Class Counsel moved to suspend portable XRF bone scanning. RE 1443. The motion was opposed only by Liaison Counsel. *Id.*, PageID #55698. Class Counsel reported that (1) XRF bone testing was not FDA approved, (2) Thermo Scientific *strenuously* warns against use on humans, and (3) that it was unclear whether Napoli's device was properly licensed. "Class Plaintiffs are not addressing whether the use of XRF bone scanning as a method of determining compensation is an *appropriate* consideration for inclusion in the settlement grid. Rather, the more pressing question is whether implementation of portable XRF bone scanning is even *permissible*." *Id.*, PageID #55713.

D. March 1 off-the-record hearing.

Within hours of class counsel's filing, the court convened a Zoom hearing, not noticed on the public docket, nor to any of the petitioners or their counsel. After greeting the settling parties, the court stated "This is not an oral argument on the motion," then said "So what I'd like to do now is go off the record. We will be discussing case management, the processes connected to this motion and what is to follow from its filing. And once we've had this discussion, we can go back on the record…." Ex. B at 7-8.

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[6] *See also* Paul Egan, *Manufacturer of portable lead scanner: Stop using our device on Flint residents* (Jun. 3, 2021), https://www.freep.com/story/news/local/michigan/flint-water-crisis/2021/06/03/flint-lead-thermo-fisher-bone-scan/7523747002/.

Following a 26-minute gap, the district court returned to the record and reported "it was determined—well, I set forth that the motion must be withdrawn as noncompliant with the Court's practice guidelines as well as the duties of the counsel." *Id.* at 8. Class Counsel filed a notice of withdrawal of the motion without further explanation. RE 1449.

Two days later, the court filed a "Notice" concerning "two docket entries," citing Dr. Reynolds' objection and Class Counsel's withdrawn motion. RE 1454. For "informational purposes only," the court attached a letter from Liaison Counsel asserting that XRF testing is safe and need not be FDA-approved. RE 1454, 1454-1.

E. Petitioners' objections and motions.

The Hall Objectors objected to the fee request (RE 1548), and Chapman Plaintiffs filed a series of objections to the inequitable availability of XRF bone testing—in particular attorney Cuker's clients were denied access to the tests. *E.g.*, RE 1534. The Hall and Chapman objectors each also moved for discovery from the settling parties (RE 1586, 1710), and largely joined each other's motions. The Chapman motion attached under seal an excerpt from the deposition of physics professor Aaron Specht, Liaison Counsel's XRF expert to support its argument.

F. Order to show cause against Cuker.

The Chapman discovery motion prompted co-lead liaison counsel Stern to move for an order to show cause regarding attorney Cuker's use of the Specht transcript. RE 1716. Stern alleged that the transcript remained under a destruction order for attorneys who did not represent bellwether clients. *Id.*

The court struck Chapman Plaintiffs' motion with leave to refile, and ordered Cuker to reveal how he obtained the transcript. RE 1718.

In response, Cuker showed that Stern had assented to Class Counsel obtaining the Specht transcripts because a non-settling defendant's expert relied on them. RE 1720, PageID ##62519-24. After obtaining the transcript, Michael Pitt forwarded it to Dr. Reynolds' counsel, who then sent it to Cuker and others. *Id.*

G. May 3 off-the-record conference and directives to Michael Pitt.

Three days after Cuker's response to the order to show cause, the court convened a non-public conference to which it invited no petitioner. According to Pitt (during a public May 26 status conference), the first topic of conversation was "circumstances that led to the sharing of the transcript." Ex. E at 46. The court said that the conference was unrelated to Cuker or Washington. *Id.* at 39. Pitt and the district court agreed that the court asked Pitt to confirm he still supported the settlement. *Id.* at 40. The court contended that forwarding the transcript "appears at least arguably at odds with…Pitt's obligations under the [Settlement]." Ex. A at 10.

Following the conference, Pitt wrote a letter dated May 5 directed solely to the court, copying no other parties. Ex. E at 46. The district court called this "an error," but Pitt disagreed, reporting that he was "following the court's instructions" "on that particular day." *Id.* at 47. Later circulated to settling counsel, the letter for "no particular reason" was not filed. *Id.* at 43.

The May 5 letter came to light only on May 25, when Liaison Counsel filed it inadvertently. RE 1802-2, PageID ##64674-76 (background on mistaken filing). In the

letter, Pitt refers to the May 3 conference and "reaffirm[s] my support for the Settlement," expressing support for the hypothetical safety of XRF bone testing, but reiterating his concern about its limited accessibility. Ex. C.

On May 13, Pitt directed another letter to the Court, which Liaison Counsel had intended to file rather than the May 5 letter. Like the May 5 letter, it assured the court that bone testing "can be" performed safely, but omits reference to any nonpublic conference and also deleted Pitt's concern about the limited availability of XRF testing. Ex. D.

H. The Court denies Petitioners' motions to halt *ex parte* conferences.

On May 4, objectors learned of the May 3 conference through a docket entry that said "'In-chambers' status conference with settlement counsel held on 5/3/2021; (Court Reporter: None Present, Not on the Record)." On May 10, the Hall Objectors moved the court to (1) invite Hall Objectors to future non-public hearings with settling parties, (2) record such proceedings under 28 U.S.C. § 753(a), and (3) reconstruct the record of pertinent off-the-record proceedings that had already occurred. RE 1736. Chapman Plaintiffs joined the motion (RE 1738). Liaison Counsel filed a response laden with spurious attacks on Hall Objectors' counsel (citing "Bednarz" 31 times), and arguing that conferences are not "*ex parte*" when Class Counsel attends. RE 1799.

The court denied the motion "with prejudice" on grounds that conferences are not *ex parte* when Class Counsel attends, while also shedding more light on the disputed conferences. Ex. A. The court admitted the attendance of "Settlement Counsel," including both Class and Liaison Counsel as well as all settling defendants—but not any

opponents to the Settlement or fee request. Ex. A at 6-7. The March 1 hearing occurred because Class Counsel's motion to suspend XRF tests "appeared to directly contradict the position…Class Counsel took when they signed the…MSA." *Id.* at 8. While both Class Counsel filed the motion, the court singled out Pitt as having "indicated that he would withdraw the motion." *Id.* at 9. Pitt "could have withdrawn as Co-Lead Class Counsel, or he could have requested that this subject be heard at the next status conference if he believed the relief sought did not violate the terms of the MSA." *Id.* at 10.

Likewise the court reported that it convened the May 3 conference because Class Counsel's sharing of the Specht transcripts "appear[ed] at least arguably at odds with Mr. Pitt's obligations under the MSA." The court did not address Pitt's different recollection of this hearing—that the first topic was the provenance of the Specht transcript, the first subpart of the order to show cause (RE 1718, PageID 62500)—but the court did recount that it "reasonably requested that Mr. Pitt confirm his statements in writing." *Id.* at 11. The court did not explain why Pitt did this *twice*, nor address objectors' inference that another communication occurred between the dates of these letters. ER 1802, PageID #64666. The court asserted "Pitt's letters have no bearing, whatsoever, on the objections." Ex. A at 13.

Summary of the Argument

The district court held multiple *ex parte* conferences addressing substantive issues relating to objections to the proposed settlement and $202.8 million fee request without permitting objecting counsel's presence. Moreover, at these conferences, based on a *sua sponte* interpretation of the unapproved settlement, the court compelled Class Counsel to take certain actions (dropping a motion and writing endorsement letters) against the interests of petitioners and the class at large. Class Counsel complied by withdrawing a motion intended to protect class members against a component of the settlement—XRF bone scanning—that appears medically questionable and regulatorily unapproved. *Compare* RE 1446 (motion to suspend portable XRF scanning) with RE 1449 (withdrawing motion). Under the specter of having his class counsel co-lead position revoked, Michael Pitt also later complied with the court's directive to author two letters to the court extolling XRF bone scanning. Ex. A at 11-12.

The district court has denied a motion to cease engaging in these actions, which exceed the permissible scope of judicial discretion. They violate two core tenets of judicial conduct. First, with limited exceptions not applicable here, judges may not have substantive *ex parte* communications with litigants or their counsel. Second, judges must remain neutral arbiters of disputes; they may not direct, assist, or coerce counsel's litigation strategy in support of a contested motion. Either violation would properly ground a mandamus petition. Combined, "they certainly do." *In re Univ of Mich.*, 936 F.3d 640, 466 (6th Cir. 2019) ("*U. Mich.*").

Legal Standard

The All Writs Act allows this Court to "issue all writs necessary or appropriate in aid of [its] jurisdictio[n] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). "By the time of Blackstone, it was well-settled that a court could issue a writ of mandamus to the judges of any inferior court to restrain their excesses." *U. Mich.*, 936 F.3d at 466 (internal quotation omitted). Mandamus relief is warranted when petitioners (1) "have no other adequate means of obtaining relief"; (2) "demonstrate a right to issuance that is clear and indisputable"; and (3) "show that the issuance of the writ is appropriate under the circumstances." *Id.*. Additionally, this Circuit examines whether the district court's error is "oft-repeated," "manifests a persistent disregard for the federal rules," and "raises new and important problems, or issues of first impression." *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008) (citing *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997)).

The right to mandamus is clear, indisputable, and appropriate when the district court has exceeded the judicial power, abused its discretion, or disregarded the Rules of Civil Procedure. *U. Mich.*, 936 F.3d at 466 This Circuit has adopted a "flexible rather than a rigid approach." *Perrigo*, 128 F.3d at 435. Petitioners need not show that every factor is met "and some factors will often be balanced in opposition to each other." *John B.*, 531 F.3d at 457 (citing *Perrigo*, 128 F.3d at 435); *accord In re Bendectin Prods. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984).

Argument

I. The district court overstepped its discretion.

Under the "original promise" of Article III, federal courts should "exercise neither 'force nor will' but merely 'judgment.'" *U. Mich..*, 936 F.3d at 461 (quoting The Federalist No. 78, at 465 (Alexander Hamilton) (J. Cooke ed., 1961)). "Judgment" means impartial judgment: "weigh[ing] the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. 133, 136 (1955).

The court below has not lived up to this promise. Rather, while presiding over contested motions for settlement approval and attorneys' fees, it has held unrecorded *ex parte* proceedings without counsel for the petitioning objectors. At these *ex parte* meetings, the court abdicated its role as a neutral administrator of justice, and instead on at least two occasions impelled co-lead class counsel to take specific actions in apparent defense of the proposed, but opposed, motion for settlement approval.

A. District courts lack authority to hold *ex parte* meetings to discuss substantive matters.

Canon 3A(4) of the Code of Conduct for United States Judges reads:

> "A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, 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. If a judge receives an unauthorized *ex parte* communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested."

The canon exempts from its prohibition *ex parte* communications that are "authorized by law," made "with the consent of the parties," "with a disinterested expert on the law," and "for scheduling, administrative, or emergency purposes, but only if the *ex parte* communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication." Canon 3A(4)(a)-(d). The district court's limited description of the *ex parte* meetings on March 1 and May 3, shows that the meetings addressed substantive matters and that none of the exceptions apply. Ex. A at 8-11.

Though the district court offers several justifications, none qualify as sufficiently "compelling" to breach Canon 3A(4). *See Guenther v. Comm'r*, 939 F.2d 758, 760 (9th Cir. 1991). First, the court declares that the *ex parte* meetings were "neither 'hearings' nor adjudicative." Ex. A at 7; *accord id.* at 12 ("nothing was adjudicated"). But the relevant question is not whether the meetings were "hearings" or "adjudicative," it is whether the *ex parte* correspondence addresses substantive matters.[7] Fed. R. Civ. P. 77(b) licenses off-the-record meetings, but it does not license *ex parte* meetings. *Contra* Ex. A at 4, 7.

Next, the district court asserts that the substance of those meetings did not "relate[] to motions filed or opposed by counsel who are not present." Ex. A at 13. That assertion is incongruent with the court's own description of the *ex parte* meetings.

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[7] It's unclear that pressuring class counsel into withdrawing a motion at the risk of removal as class counsel (Ex. A at 10; Ex. B. at 8), is non-adjudicative.

Petitioner Reynolds's objections precipitated class counsel's motion to suspend bone scanning, which precipitated the March 1 hearing. *Compare* Ex. A at 9, *with* RE 1446 *and* 1436. Dr. Reynolds, and the other petitioners objecting to the use of bone scanning, as a mechanism both to enhance disproportionately some class-member payments and to funnel attorneys' fees to Liaison Counsel, had a self-evident interest in the disposition of class counsel's motion.

Both the Chapman plaintiffs' motion and their counsel's response to the order to show cause precipitated the May 3 meeting. Ex. A at 10. Again, petitioners had a self-evident interest in being present for conversations that addressed their motion and whether class counsel Pitt genuinely supported the settlement's bone-scanning terms. It is factually incorrect to say that the letters—which the court instructed Pitt to draft during and after that meeting—"have no bearing, whatsoever, on the objections." Ex. A at 13. Those letters, Exhibits C-D below, announce qualified support for XRF testing, which petitioners objected to. *E.g.*, RE 1436, 1534. Indeed, the May 5 letter even reiterates Chapman Plaintiffs' objection to inaccessibility of scanning.

Yes, courts may hold off-the-record private *settlement* conferences. Ex. A at 5-6. But again, the record reveals that the *ex parte* meetings petitioners object to were not of that variety. The settlement here was dated November 16, 2020, with the last errata sheet signed January 14, 2021. RE 1394-2. With the class notice and objection period now closed, the settlement and fee motion await adjudication under Rule 23. Contested motions relating to that existing settlement, and corresponding to objections raised by the petitioners occasioned the *ex parte* meetings.

To the extent that the March 1 meeting could be characterized as a settlement conference related to class counsel's motion, it is well-settled that although judges have discretion to "encourage and aid early settlement,…they should not attempt to coerce that settlement." *In re NLO*, 5 F.3d 154, 157 (6th Cir. 1993). The district court's order suggests that Pitt was offered a Hobson's choice of withdrawing the motion or withdrawing from his position as co-lead class counsel. Ex. A at 9-10. Indeed, "veiled threats" from a judge (as these appear to be) can create a conflict of interest for counsel by driving a wedge in between their personal interests and those of their client, the class. *See Walberg v. Israel*, 766 F.2d 1071, 1075 (7th Cir. 1985) (Posner, J.).

Finally, the court rationalizes that all settling counsel were present and remain formally adversarial until the settlement is final and "[t]he meeting does not become *ex parte* merely because counsel to an objection was not present." Ex. A at 12-13. As a matter of practical reality, adversarialness between the initial parties is usually lost when settlement is struck. *E.g. Pampers*, 724 F.3d at 718; *Thorogood v. Sears Roebuck & Co.*, 547 F.3d 742, 745 (7th Cir. 2008). Objectors counteract this loss by "providing an adversarial context" for the district court to assess settlement and attorneys' fee fairness—a "substantial" "contribution." *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 743-44 (3d Cir. 2001).

Even if, however, the district court is correct that the posture of the settling parties remains adversarial, that is no excuse for excluding objectors' counsel. Holding conferences with less than all parties does not comport with Canon 3A(4). It is "well established" that an "*ex parte* proceeding" is one "in which **not all** parties are present

or given the opportunity to be heard." *United States v. Abreu*, 202 F.3d 386, 390 (1st Cir. 2000) (quoting BLACK'S LAW DICTIONARY) (emphasis added). Likewise, an *ex parte* communication is one that excludes any interested party.

The Supreme Court held in *Devlin* that objectors bound by the settlement are entitled to "party" status for the purpose of pursuing and appealing their objections. 536 U.S. at 10-14. Therefore, the district court's decision to exclude objectors from the rule against *ex parte* communications contravenes the rule of *Devlin*. *Cf. In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.,* 418 F.3d 277, 319 (3d Cir. 2005) ("closed-door session without objectors was *ex parte*). The point of *Devlin* was to avoid burdening courts with redundant motions to intervene. 536 U.S. at 10. If objectors must intervene to protect themselves against *ex parte* proceedings, it undoes *Devlin*.

Precedent on *ex parte* proceedings echoes the prohibition of Canon 3A(4). "As a general rule, *ex parte* communications by an adversary party to a decision-maker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process." *Thompson v. Greene*, 427 F.3d 263, 269 n.7 (4th Cir. 2005) (cleaned up). Because these *ex parte* conferences also occurred without recording, "there was no way for [petitioners] to adequately respond to or counter facts presented by their adversaries because they had no way of knowing what was said during those unrecorded meetings." *In re Kensington Int'l*, 368 F.3d 289, 310-11 (3d Cir. 2004) (granting mandamus to disqualify judge); *see also Edgar v. K.L.*, 93 F.3d 256, 258 (7th Cir. 1996) (Easterbrook, J.) (drawing the "natural" inference that undisclosed *ex parte* discussions

"cover[ed] subjects at the core of the litigation" and granting mandamus to recuse judge). In *Kensington*, a district judge and appointed advisors engaged in numerous *ex parte* meetings at first without objection. *Kensington* found that long acquiescence and the "equal opportunity" nature of the meetings provided no defense. "To fulfill the principles and objectives of Canon 3…, which proscribes *ex parte* communications except with consent, affirmative consent is dictated. The record reveals no such consent was ever given." *Id.* at 311. The *ex parte* procedure is even more harmful here, with neither equal opportunity to participate nor acquiescence.

Sixth Circuit precedent agrees. "The value of a judicial proceeding is substantially diluted where the process is *ex parte* because the court does not have available the fundament instrument for judicial judgment: an adversary proceeding in which both parties may participate." *United States v. Barnwell*, 477 F.3d 844, 853 (6th Cir. 2007) (cleaned up). "[E]x parte communications should be avoided. If any such communications do occur…the district court should endeavor to disclose, as appropriate, the *ex parte* communication to the parties as soon as possible. Moreover, decisions made by the district court in reliance on any undisclosed *ex parte* communications are inappropriate." *United States v. Lanier*, 748 Fed. Appx. 674, 678 (6th Cir. 2018). Although "not every *ex parte* communication to the trial court requires reversal…some conduct is so inimical to the fair and impartial administration of justice…that the presumption of prejudice arising therefrom is conclusive and requires an automatic reversal." *Price Bros Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446 (6th Cir. 1980) (remanded for a full report on a law clerk's *ex parte* investigation).

In *Reed v. Rhodes*, 179 F.3d 453 (6th Cir. 1999), this Court declined to recuse the trial court following *ex parte* communications that "were ministerial in nature and did not pertain to matters at issue between the parties as adversaries and it was "undisputed that [the judge] personally extended to [opposing counsel] an invitation to attend all of these meetings." *Id.* at 468-69. Opposing counsel "consistently refused this invitation over an eight-month period during which many of these meetings took place and failed to register any objection to the meetings at that time despite knowing *ex ante* that these conferences had already been scheduled." *Id.* at 468. In dissent, Judge Cole took a different view of the facts and the law: in his view "failure to timely object" could not cure a violation of Canon 3A(4) because the burden remains on the judge. *Id.* at 488. And with respect to the facts, as he read the record "such invitation [to opposing counsel] was extended *after* undetermined meetings had transpired" where matters "related directly to this case" "were discussed" *ex parte*. *Id.* at 487-88. These *ex parte* contacts eroded "the cornerstone of fair judicial proceedings"—"a fair and impartial judicial officer." *Id.* at 488.

Besides being distinguishable from *Reed*'s facts, this petition does not seek the district court's disqualification. Rather, it seeks prospective and retrospective remedies to return the petitioners to an even footing, and a clarification of objectors' rights. *Cf. Nat'l Farmers Org., Inc. v. Oliver*, 530 F.2d 815, 817 (8th Cir. 1976) (granting mandamus to require district court to "hold no further off-the-record proceedings in this case which any party requests be recorded"); *Pittsburgh v. Simmons*, 729 F.2d 953, 955 (3d Cir. 1984) (denying writ of mandamus that sought recusal of judge for holding off the record

proceedings but noting that it "might well have voted to issue the writ" if the petitioner sought "a writ directing a verbatim transcription of the proceedings").

The essential characteristics of American courts—transparency, due process, and adversarial proceedings—are not disposable formalities. "Whatever value…*ex parte* meetings may have…in moving…[c]ases along or creating a settlement-friendly atmosphere [are] outweighed by the attendant risks and problems." *Kensington Int'l*, 368 F.3d at 294-95; *see also In re Nat'l Prescription Opiate Litig*, 927 F.3d 919, 933 (6th Cir. 2020) ("improper" for district court to use right of public access as a "bargaining chip" to promote settlement). "While a welcome byproduct of deciding cases or controversies on a class-wide basis, the goal of global peace does not trump Article III or federal law." *In re Deepwater Horizon*, 732 F.3d 326, 343 (5th Cir. 2013) (internal quotation omitted). Nor does it trump the procedural safeguards of Rule 23. *Amchem v. Windsor Prods.*, 521 U.S. 591, 620-21 (1997); *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 670 (6th Cir. 2020) (improper to use a novel class certification mechanism to foster settlement). "[T]he pressure to close cases must not overshadow the federal courts' paramount role of being a forum where disputes are efficiently and fairly resolved." *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 86 (2d Cir. 2018).[8]

[8] Although the hydraulic pressure to resolve cases only rarely manifests itself in prohibited *ex parte* contacts, "districts judges, predisposed to favor settlement and unaccustomed to inquisitorial judging" are often too deferential to settling parties and "problematic" settlements. *E.g.,* Howard Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. 859, 869 (2016).

By holding *ex parte* meetings on substantive matters related to the pending settlement without a compelling justification, the district court has usurped power and abused its discretion.

B. District courts lack authority to direct the litigation strategy of parties.

As Judge Cole recognizes in *Reed*, there is a relationship between prohibiting *ex parte* communications and the Due Process cornerstone of impartial, even-handed adjudication. 179 F.3d at 488. "[A] judge must not only be impartial; he or she must, additionally *avoid all appearances* of partially. *Id.* (citing *Anderson v. Sheppard*, 856 F.2d 741, 746 (6th Cir. 1988)).

Anderson is instructive. There, the district court judge expressed exasperation, hostility, and bias after the plaintiff declined to settle on terms that the defendant had offered and that the district court believed were suitable. 856 F.2d at 747. Even though the ultimate trial appeared to be fairly conducted, this Circuit held that the judgment against the plaintiff could not stand because "of the fundamental need for judicial neutrality." *Id.* at 746. That "requirement of neutrality in adjudicative proceedings serves dual interests of equal importance, as it preserves *both* the *appearance* and *reality* of fairness." *Id.* at 746 (cleaned up). One component of maintaining judicial neutrality and the appearance thereof is the district court "sedulously avoid[ing] all appearances of advocacy." *Id.* at 745 (quoting *United States v. Hickman*, 592 F.2d 931, 933 (6th Cir. 1979)).

Anderson draws upon *Knapp v. Kinsey*, which outlines the proper judicial role. 232 F.2d 458, 466 (6th Cir. 1956). To "preserve an atmosphere of impartiality," the judge

should not "clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment…with one of the parties for the purpose of furthering or supporting the contentions of such party." 232 F.2d at 466. A judge may not "figuratively speaking, step[] down from the bench to assume the role of advocate" for one side. *Id* at 467.

But the district court below has done just that. From all appearances, at the March 1 *ex parte* conference, the court stepped into the shoes of advocate for a peculiar interpretation of the settlement, against the interests of petitioners, and intimidated Class Counsel into withdrawing its motion to suspend portable XRF scanning. The district court acknowledged that "the settlement is not yet final" (Ex. A at 12) and that some parties oppose settlement approval, yet her actions in directing class counsel presume that the settlement (and the XRF testing component in particular) is in the best interests of the class, is already effective, and must be enforced *sua sponte*. Ex. A at 9-10 (describing the court's concerns that Pitt violated terms of the Settlement).[9]

Class counsel's ethical duty always lies with the best interests of the class. If class counsel learned of new facts, such as those Petitioner Reynolds's objection brought to light, they have an obligation to the class to consider those facts and act as needed. *See Barney v. Holzer Clinic*, 110 F.3d 1207, 1213-14 (6th Cir. 1997) (adequate representation is an ongoing duty). When the district court *sua sponte* raised and construed an

[9] The court's citation for supposed violation of "Practice Guidelines" under the Case Management Order makes no sense; that section concerns "Discovery Dispute Protocol." RE 1255, PageID #39351.

ambiguous provision of the proposed (but unapproved) settlement agreement to preclude class counsel's motion,[10] it not only stifled class counsel's discharge of fiduciary duty, it stepped into the shoes of an advocate for the settlement and prejudged it to be fair, reasonable, and adequate.

Similarly, when the district court ordered Pitt at the May 3 *ex parte* conference to draft a letter to the court in support of bone scanning (and apparently subsequently ordered Pitt, again *ex parte*, to submit a revised letter),[11] it stepped into the role of advocate for contested provisions in a contested settlement agreement. As in *Knapp*, the "District Judge took an active part in assisting [the settlement proponents] in presenting their case and in proving their contentions." *Knapp*, 232 F.2d at 464. Conveying agreement with one side of a controversy is "a troubling departure from the appearance of impartiality that judges must maintain at all times." *United States v. Mukes*, 980 F.3d 526, 531 n.2 (6th Cir. 2020). Put another way, "as a neutral arbiter" a judge may not "advocat[e] for h[er] desired result" or present the appearance of doing so. *In re United States*, 572 F.3d 301, 311 (7th Cir. 2009).

Citing the Manual for Complex Litigation, the district court observed the law's preference for efficient management that "minimize[s] unnecessary waste of time and money." Ex. A at 5. Unfortunately, in exalting the pending settlement, the district court

[10] Signatories to the Settlement need only support its provisions "as appropriate" (Settlement, PageID #54192), and the settling parties are obligated to "negotiate," "modify," and "revive" the Settlement if any portions are not approved. *Id.* PageID #54180.

[11] RE 1802-2, PageID ##64673-74.

violated a more specific Manual instruction: "The judge must guard against the temptation to become an advocate—either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of a responsibility to protect the rights of those not party to it. Judges should be open to the view of those who may be affected by the settlement." Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.4 (2004).

The district court's advocacy for the contested settlement (and a particular interpretation of it) demonstrates the prejudice caused by its *ex parte* unrecorded conferences. By exercising "will" rather than "judgment" the district court usurped power and abused its discretion. Alexander Hamilton, THE FEDERALIST NO. 78.

II. Mandamus is justified.

As detailed above, the district court exercised power beyond its authority, and thereby abused its discretion, as warrants issuing the writ. *U. Mich.*, 936 F.3d at 466. Additionally, as described below, petitioners have no other means of obtaining relief. Furthermore, failing to remedy the district court's missteps will harm not only petitioners, and thousands of other Flint residents with an interest in these proceedings, but also the vitality and fairness of the Rule 23 class device.

A. Petitioners have no other means to obtain relief.

Through their motion (RE 1736), the petitioners afforded the district court the opportunity to assure objectors, the class, and the public, that it would not hold future *ex parte* conferences, and the opportunity to reconstruct the record of proceedings at the past conferences. But the district denied petitioners' motion in full with prejudice.

Ex. A at 17. This order is not subject to interlocutory appeal for it does not involve a "'controlling question of law' that would 'materially advance the ultimate termination of the litigation.'" *U. Mich*, 936 F.3d at 466 (quoting 28 U.S.C. § 1292(b)).

Nor can petitioners wait for direct appeal after a final approval order. Each passing day presents the risk of more *ex parte* conferences on substantive issues, and that the district court could continue to direct the settling parties to defend the settlement in ways that conflict with the interests of the objectors and with the impartial administration of justice.[12] It is possible that the district court will discontinue its practice of holding *ex parte* conferences, but there is no indication that it intends to.[13] Its order fully defends its *ex parte* meetings while condemning petitioners' motion and litigation strategy as "outrageous," "strident," "insulting," "misinformed,"

[12] As for the retrospective relief petitioners seek (a full accounting of past conferences and what occurred at those conferences), memories eventually become stale and, even if recall were perfect, petitioners' current litigation strategies may change depending on the accounting. A later retrospective remedy would not be a substitute for the writ here.

[13] To determine whether they needed to move for writ earlier, on May 13 the Hall Objectors asked the district court when the motion would be heard and whether "any additional unrecorded conferences with settling parties have recently occurred or are presently scheduled." RE 1802-5. The court responded by forbidding Hall Objectors from emailing the court (RE 1802-8) and then characterized the email as an attempt "to improperly 'take discovery' on the Court in support of this motion." Ex. A at 16. Thus, on information and belief, many more conferences with settling parties have occurred. Liaison Counsel represented it would be burdensome to identify within eight hours all of the off-the-record conferences that occurred with settling parties since February 26, 2021. RE 1802-7.

"unsupported," "speculative," "bewildering, if not…troubling," and "just *weird*." Ex. A at 8, 11, 15, 16.

"[M]andamus relief is not restricted to petitioners who can establish beyond all doubt that irreparable harm will occur unless the writ issues." *In re Syncora Guar. Inc.*, 757 F.3d 511, 516 (6th Cir. 2014). Rather, "[t]his court may 'exercise its mandamus jurisdiction when a party is *in danger* of harm that cannot be adequately corrected on appeal and has no other adequate means of relief.'" *Id.* (quoting *In re Life Investors Ins. Co of Am.*, 589 F.3d 319, 323 (6th Cir. 2009) and adding emphasis)).

A writ of mandamus is petitioners' only adequate means of obtaining relief.

B. This petition presents a significant issue of first impression relating to the administration of justice in class action proceedings.

The district court's improper and clandestine handling of proceedings will not only have ramifications for the 100,000 Flint residents who have already been grievously wronged by their government. It will also have ramifications for class action proceedings more generally. Openness and transparency are fundamental values given the public's "keen and legitimate interest" in class proceedings. *Shane Group, Inc. v. Blue Cross Blue Shield*, 825 F.3d 299, 302 (6th Cir. 2016). And when absent class members object to proposed settlements and fee awards, they are parties for the purposes of pursuing those objections and engaging in related motion practice. *Devlin*; *Pearson v. Target Corp.*, 893 F.3d 980, 984 (7th Cir. 2018).

It is unacceptable to consign objectors to second-class litigant status and exclude them from meetings discussing relevant substantive matters. It is no answer say that the

settling plaintiffs and settling defendants are still "adversaries" because the settlement is not yet final. Order, Ex. A at 12. At settlement, "the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class." *Pampers*, 724 F.3d at 718. But regardless, objectors are separate and independent parties, and 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). "Class members cannot participate meaningfully in the process contemplated by Federal Civil Procedure 23(e)" unless they can participate on equal footing with the settling parties in the process adjudicating the motions for settlement and fee approval. *Shane Group*, 825 F.3d at 309.

The district court's order hollows out objectors' rights under Rule 23 and *Devlin*'s recognition of those rights. *Compare In re Am. Medical Sys.*, 75 F.3d 1069, 1074 (6th Cir. 1996) (granting mandamus based upon district judge's severe and frequent "disregard of class action procedures"); *Bendectin.* 749 F.2d 300 (similar). If the district court's protocol stands, and other courts adopt it going forward, it would disserve the rule of law and Rule 23. This consequential question is another reason to grant the writ. *See John B.*, 531 F.3d at 457.[14]

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[14] "A district court decision that presents issues of first impression rarely will also involve an oft-repeated error." *Bendectin*, 749 F.2d at 306 n.16. Because "even a little cloud may bring a flood's downpour" if this Court does not halt the practice, mandamus is appropriate even where the problem is not yet widespread. *La Buy v. Howes*, 352 U.S. 249, 258 (1957); *accord Bendectin*, 749 F.2d at 306-07.

Conclusion

Petitioners respectfully request that this Court issue a writ of mandamus ordering the district court (1) to cease holding off-the-record substantive *ex parte* meetings that exclude petitioners' counsel; (2) to order the participants at the March 1 and May 3 conferences to recount for the record their recollection of what transpired at those conferences; (3) to order settling parties to identify any other substantive unrecorded conferences since February 26, 2021; and (4) to refrain from continuing to prescribe or dictate the litigation strategy of the parties in advocating for the settlement.

Dated: June 25, 2021

Respectfully submitted,

/s/ Adam E. Schulman

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This brief complies with the type-volume limitation of Fed. R. App. 21(d)(1) because this brief contains 7,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1), as counted by Microsoft Word 2019.

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Executed on June 25, 2021.

/s/ Adam E. Schulman
Adam E. Schulman

Exhibit A

Order Denying Hall Objectors' Motion [1736]

RE 1830

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re Flint Water Cases.

Judith E. Levy
United States District Judge

________________________________/

This Order Relates To:

ALL CASES

________________________________/

ORDER DENYING *HALL* OBJECTORS' MOTION [1736]

Before the Court is the *Hall* Objectors' Motion to Attend Further Conferences with Settling Counsel and for Settling Parties to Provide a Description of Non-Public Hearings. (ECF No. 1736.) State Defendants and Co-Liaison Counsel for Individual Plaintiffs filed responses (ECF Nos. 1798, 1799) and the *Hall* objectors filed a reply. (ECF No. 1802.) The *Hall* objectors' motion wrongly assumes that the Court has conducted *ex-parte* hearings and adjudicated matters behind closed doors. For this and other reasons set forth below, the motion is denied.

I. BACKGROUND

The Flint Water Cases include tens of thousands of plaintiffs who are represented by over 200 individually retained attorneys and putative

class counsel. These lawyers practice in at least nine different states and Puerto Rico. As of today's date, there are over 1820 docket entries on the *Carthan v. Snyder, et al.*, No. 16-10444, docket alone, and over 360 docket entries in *Walters v. Flint*, *et al.*, No. 17-10164. *Carthan* and *Walters* are just two of the 88 Flint Water Cases (85 of which are still pending) assigned to the undersigned. The Court has held countless hearings in these cases since the litigation began in 2016, and has adjudicated hundreds of issues, ranging from discovery disputes to dispositive motions.

Before the COVID-19 pandemic, hearings in the Flint Water Cases took place in the courthouse in Ann Arbor, Michigan and via teleconference. In order to welcome the number of lawyers, spectators, and members of the media who wished to be present, the Court provided extra chairs throughout the courtroom and permitted lawyers and spectators to fill the jury box and the well of the courtroom. Once the COVID-19 pandemic hit in March 2020, proceedings moved quickly to online video-teleconference to allow the case to proceed efficiently. The Court made these hearings available to the public through the Eastern District of Michigan's website, where the public can watch the

proceedings on YouTube. The Court also developed video-teleconference guidelines and requirements,[1] which it seems that the *Hall* objectors have not reviewed.

II. LEGAL STANDARD

District Courts have discretion to manage their own dockets as they see fit. *See Jordan v. City of Detroit*, 557 Fed. App'x 450, 456–57 (6th Cir. 2014) (discussing the district court's "inherent authority to control its docket in promoting economies of time and effort for the court, the parties, and the parties' counsel" (internal citations omitted)); *Bowles v. City of Cleveland*, 129 Fed. App'x 239, 241 (6th Cir. 2005) ("[A] district court has inherent power to protect[ ] the due and orderly administration

[1] The *Hall* objectors' Reply brief reveals their counsel's ignorance regarding the Court's well-established processes and procedures for obtaining Zoom links to hearings. For example, their brief states, "Fortunately other objectors' attorneys have asked on my behalf for links to attend the conferences via Zoom, which I would not have otherwise been invited to." (ECF No. 1802-2, PageID.64679.)

The Court sends Zoom links directly to those counsel whom it anticipates will have a speaking role at a particular hearing, which is determined by the hearing agenda. If other counsel wish to speak at the hearing and have not received the link, they are directed to submit a request to Co-Liaison Counsel for Individual Plaintiffs (copying all other lead counsel) in advance of the hearing. Co-Liaison Counsel are required to compile such requests and submit them to the Court. Although the Court has never denied counsel for the *Hall* objectors -- or any other counsel of record -- access to the Zoom links for hearings, it is within the Court's authority to do so.

of justice and ... maintain [ ] the authority and dignity of the court....") (internal citations omitted).

The Federal Rules of Civil Procedure grant the Court wide discretion to convene meetings, conferences, and even to adjudicate proceedings in chambers with or without a court reporter. Rule 77(b) states:

> Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. *Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district.* But no hearing--other than one ex parte--may be conducted outside the district unless all the affected parties' consent.

Fed. R. Civ. P. 77(b) (emphasis added). In other words, every proceeding, save for trial, is permitted under this rule to be conducted in chambers and off the record, if the Court so chooses. However, as set forth above, the Court has largely not chosen this route in the Flint Water Cases and has always adjudicated motions and other matters in public hearings on the record.

In the Sixth Circuit, off-the-record meetings are common. This is particularly true for scheduling matters, and for matters related to settlement. The Sixth Circuit encourages courts to hold certain

settlement discussions in private. "In fact, to achieve the purposes that the Rules do permit, settlement conferences should be private, not open to the media and the public." *In re University of Michigan*, 936 F.3d 460, 464 (2019). The Sixth Circuit states:

> for a settlement conference to work, "parties must feel uninhibited in their communications." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003). They must be free to make candid assessments, admit their strengths and weaknesses, offer concessions, and put on hold the performative aspects of trial. For this reason, "confidential settlement communications are a tradition in this country" and "[t]his Court has always recognized the need for ... secrecy in settlement proceedings." *Id*.

Id. at 465.

Further, management of complex litigation must be done efficiently and economically. The Federal Judicial Center's *Manual on Complex Litigation* section 10.22, (4th ed. 2004) endorses methodologies that minimize unnecessary waste of time and money. Conducting some conferences off the record, while favoring on-the-record hearings in general, is recommended in the *Manual on Complex Litigation* where it states:

> On-the-record conferences will minimize later disagreements, particularly if the judge anticipates issuing oral directions or

> rulings. Many judges hold all conferences on the record, particularly where numerous attorneys are in the courtroom. Nevertheless, an informal off-the-record conference held in chambers or by telephone can sometimes be more productive; a reporter can later be brought in to record the results of the conference. (28 U.S.C. § 753(b) sets forth the requirements for recording various proceedings.) Rule 16 requires (and sound practice dictates) that all matters decided at pretrial conferences be memorialized on the record or in a written order. Counsel may be directed to submit proposed orders incorporating the court's oral rulings.

Id. § 11.22.

Finally, neither the Sixth Circuit, the Michigan Rules of Professional Conduct, nor the Code of Conduct for United States Judges define "*ex parte* communication." However, the meaning is not complicated. Black's Law Dictionary defines an *ex parte* communication as "[a] communication between counsel and the court when opposing counsel is not present. Such communications are ordinarily prohibited." Black's Law Dictionary (11th ed. 2019).

III. DISCUSSION

The *Hall* objectors' motion focuses on two meetings held in chambers with counsel to the settlement ("Settlement Counsel").[2] The

[2] These include, for Plaintiffs, Co-Lead Class Counsel and Co-Liaison Counsel for Individual Plaintiffs. And for the Defendants in the settlement, these include

first was held on March 1, 2021, and the second on May 3, 2021. The *Hall* objectors speculate that the Court held "hearings" and adjudicated motions at these meetings. These meetings were neither "hearings" nor adjudicative. While Rule 77(b) and the Court's inherent managerial authority would certainly have permitted the Court to hold off-the-record adjudicative hearings in chambers if it so chose, that is not what occurred here. It was both appropriate and permissible to hold the March 1, 2021 and May 3, 2021 meetings in chambers. The Court has no interest in "secret meetings" or clandestine activities of any sort. As all parties who have participated in this litigation for the past five years know, the reality is quite the opposite: this Court welcomes the opportunity that this litigation presents – to work hard on complicated legal and

---

counsel for the State of Michigan the Michigan Department of Environmental Quality (now the Michigan Department of Environment, Great Lakes, and Energy), the Michigan Department of Health and Human Services, the Michigan Department of Treasury, former Governor Richard D. Snyder, current Governor Gretchen Whitmer, the Flint Receivership Transition Advisory Board, Liane Shekter Smith, Daniel Wyant, Stephen Busch, Kevin Clinton, Patrick Cook, Linda Dykema, Michael Prysby, Bradley Wurfel, Eden Wells, Nick Lyon, Dennis Muchmore, Nancy Peeler, Robert Scott, Adam Rosenthal, and Andy Dillon, counsel for the City of Flint, Darnell Earley, Howard Croft, Michael Glasgow, Gerald Ambrose, Edward Kurtz, Michael Brown, Dayne Walling, and Daugherty Johnson, counsel for McLaren Health Care Corporation, McLaren Regional Medical Center, and McLaren Flint Hospital; and counsel for Rowe Professional Services Company (together, the "Settling Defendants").

procedural issues so that a just outcome can be achieved in an efficient and fair manner. The job of the judge is to be fair and impartial and to adhere to the applicable law and procedure regardless of the emotional responses and criticism that might follow. Although the undersigned does not take offense at the strident and insulting tone of the pending motion, such a tone does not benefit the arguments made. But if the Court had erred and had violated the Judicial Canons of Ethics, as counsel insists it did, the undersigned would take responsibility for those missteps and do what is necessary to correct them.

Although this opinion and order could end here, the Court will expend additional time and effort to set forth for the *Hall* objectors what happened in the two meetings they identify and why the relief they seek need not and will not be granted.

On March 1, 2021, Co-Lead Class Counsel filed a motion asking the Court to "immediately suspend" the administration of bone scans. (ECF No. 1443, *corrected* ECF No. 1446). The relief sought in that motion appeared to directly contradict the position Co-Lead Class Counsel took when they signed the Master Settlement Agreement ("MSA"), which includes a provision for bone scans and one that requires that all

Plaintiffs' counsel listed in Exhibit 17 to "[p]ublicly support the approval of and implementation of the Settlement Program" as appropriate. (MSA ¶ 22.1.2, ECF No. 1394-2, PageID.54192.) Co-Lead Class Counsel are listed in Exhibit 17. (ECF No. 1319-2, PageID.41232–41240.) In addition, the Court's standard Practice Guidelines require that counsel who wish to file non-dispositive motions must contact the Court and request time to address the issue at a discovery-dispute resolution conference. The Fifth Amended CMO contains directions for requesting that issues be addressed at regularly scheduled status and discovery conferences. (ECF No. 1255, PageID.39351–53.)

In response to this development, the Court convened a meeting with Settlement Counsel on March 1, 2021 at 6:00pm EST. The meeting was held in chambers to permit a frank, uninhibited discussion regarding Co-Lead Class Counsel's decision to file a motion that 1) was in violation of the terms of the MSA; and 2) failed to follow the Court's standard Practice Guidelines or the Fifth Amended CMO's protocol for resolving disputes that arise between regularly scheduled status conferences. At the in-chambers meeting, Co-Lead Class Counsel Michael Pitt indicated that he would withdraw the motion. He then did so that day. (ECF No. 1449.) He

certainly could have withdrawn as Co-Lead Class Counsel, or he could have requested that this subject be heard at the next status conference if he believed the relief sought did not violate the terms of the MSA. However, Co-Lead Class Counsel chose not to pursue either of these options. For this reason, the merits of the motion were never reached, and the motion was never adjudicated.

Next, several months later, the *Chapman* objectors filed a Motion to Review and Respond to Hourly Billing and Costs; and for Discovery of Bone Scan Information. (ECF No. 1710, PageID.62272.) That filing contained portions of a deposition that the Court had previously ordered sealed and not to be distributed beyond counsel to the bellwether cases. (*See e.g.*, *Id*. at PageID.62284.). The Court issued a show cause (ECF No. 1718) and learned that Co-Lead Class Counsel, Michael Pitt, had provided the confidential and sealed deposition transcript to counsel for various objectors who are not counsel in the bellwether cases. (See ECF No. 1720, PageID.52519.) This was a violation of a court order (ECF No. 1290, PageID.39774) and appears at least arguably at odds with Mr. Pitt's obligations under the MSA.

Accordingly, the Court held a meeting in chambers with Settlement Counsel on May 3, 2021 at 3:00pm ET to discuss whether Mr. Pitt wished to continue as one of the court-appointed Co-Lead Class Counsel. At the meeting, Mr. Pitt vehemently re-affirmed his commitment to his role as Co-Lead Class Counsel, as well as to the terms and conditions of the MSA. He further stated that, based on the experts to whom he had spoken, he believed that the bone scans conducted with a modified portable XRF bone scanner are safe. Mr. Pitt also indicated that he had no reason to object to any aspect of the MSA's terms—including bone scans—or to assist other counsel in doing so. The Court reasonably requested that Mr. Pitt confirm his statements in writing. Therefore, at the Court's request, Mr. Pitt wrote letters--dated May 5, 2021[3] and May

[3] The *Hall* objectors' discussion of Mr. Pitt's May 5, 2021 reveals their confusion. They state, "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." (ECF No. 1802, PageID.64662.) First, the letters were addressed to the undersigned; not "aimed toward" any objectors. Second, the Court does not "admit" anything; and characterizing the undersigned's statements during a hearing as an "admission" is a bewildering, if not a troubling look into the way counsel views the Court and its role. And finally, counsel for the *Hall* objectors is directed to read the order appointing Co-Lead and Co-Liaison Counsel, cited herein, in order to understand the duties assigned to these lawyers, which includes communication with individually-represented Plaintiffs, such as the *Hall* objectors.

13, 2021-- to confirm that he remained committed to the terms of the MSA and his duties as Co-Lead Class Counsel.[4] Nothing was adjudicated in the Court's May 3, 2021 meeting, and the Court did not make any decisions affecting the merits of any pending issues.

Next, the *Hall* objectors argue that the in-chambers meetings held on March 1, 2021 and May 3, 2021 were improper "*ex parte*" gatherings. Significantly, Co-Liaison Counsel for Individual Plaintiffs, Co-Lead Class Counsel, and counsel for the Settling Defendants were all present in chambers at both meetings. The *Hall* objectors argue that these parties are not opposed to one another because they have settled their dispute. This is wrong. These are adversaries for several reasons. First, they are both Plaintiffs' and Defendants' counsel in the litigation, and second, the settlement is not yet final. Preliminary approval was granted on January 21, 2021. (ECF No. 1399.) But the walk-away period has not yet been triggered, the claims process has not yet begun, and the Court has not

[4] The *Hall* objectors raise one issue--out of all 72 pages in their motion and reply--that warrants an honorable mention. To wit: Mr. Pitt improperly sent his two letters to the Court without copying Settlement Counsel. After the Court saw this, the Court's law clerk distributed the letters to those other counsel. Both letters are now on the docket and published in several newspapers, so the Court need not docket them on its own as it did with Mr. Stern and Mr. Shkolnik's letter about the safety of portable bone scans. (ECF No. 1455, PageID.57127.)

yet adjudicated the motion for final approval or any of its adjacent motions including Plaintiffs' Motion for Attorney Fees and Reimbursement of Expenses (ECF No. 1458) to which the *Hall* objectors object. (ECF No. 1548.) The meeting does not become *ex-parte* merely because counsel to an objection was not present.

Not only were the parties in the meeting adversaries, the Court takes care in all of its work to ensure that no discussions take place related to motions filed or opposed by counsel who are not present. None of the objections, including that of the *Hall* objectors, have been discussed, adjudicated, or decided. Mr. Pitt's letters have no bearing, whatsoever, on the objections, and neither do the in-chambers meetings.

Next, the *Hall* objectors request an order permitting their counsel to attend any hearing or meeting pertaining to the settlement where settlement counsel are present. The *Hall* objectors' counsel is subject to the same rules and requirements as all other counsel. Hearings are conducted in open court, currently via video-teleconference, and that process will continue for the duration of the Administrative Orders in the Eastern District of Michigan that limit in-person hearings during the COVID-19 pandemic. (*See* Eastern District of Michigan Administrative

Order, 20-AO-021, http://www.mied.uscourts.gov/pdffiles/20AO021.pdf). Counsel may request the Zoom link using the Court's procedures as set forth above.

As to the *Hall* objectors request that the court "remedy" past *ex parte* proceedings by requiring setting parties to "swear to a full and impartial accounting of what transpired during those two off-the-record conferences," the request is denied. As set forth above, there are no "*ex parte* proceedings" to be remedied and the proposed relief is not warranted. Moreover, the methodology proposed by the *Hall* objectors to "remedy" the nonexistent issue is wholly unsupported by authority and is an extraordinary and burdensome (if not vexatious) proposal. This is particularly true where counsel in this litigation should focus their time and attention on the scores of pending motions and preparation for the upcoming bellwether trials. The *Hall* objectors' proposal is as follows:

> Hall objectors move that four summaries be filed independently by Class Counsel, Liaison Counsel, the Special Master, and one jointly by the attending defendants. Redundancy is appropriate because each fraction may simply recall different aspects of the proceedings, and also because each party has little interest (indeed antipathy) in describing discussion relevant to objectors. Hall objectors do not waive their right to seek further discovery of the hearings if these summaries appear manifestly deficient, but hopefully

> redundant recollections will avoid the need. Following these summaries, the parties could have 14 days to object to aspects of each other's summaries and thereby complete the record. Following the corrected supplement of the record, objectors should be allowed to respond to any representations or concerns raised during these proceedings. These could occur within a consolidated briefing schedule for all objectors to reply in support of their respective motions and against the settling parties' responses to objections.

(ECF No. 1736, PageID.62819–20.) This proposal is an unnecessary and outrageous waste of time.

The *Hall* objectors' suggestion that the undersigned violated Canon 3A(4) of the Judicial Code of Conduct is likewise not well taken. (*i.e.*, ECF No. 1802, PageID.64663 ("To level the playing field and restore some semblance of compliance to Canon3A(4), the Court should grant the Motion. . .").) There is no need to "restore some semblance of compliance" with the Judicial Canons because they have not been violated. But if there had been a violation, a full remedy would be implemented, and it would accomplish much more than "restor[ing] some semblance of compliance." The Court would address the violation and proceed in full compliance with Canon 3A(4).

As to the *Hall* objectors' request under 28 U.S.C. § 753(a) & (b) that all hearings be recorded and that the Court should "default toward open

proceedings," the Court already holds all hearings on the record and has always done so. To this end, the *Hall* objectors seek relief that is already the "default" in these cases, and their motion is accordingly denied as moot.

Finally, the Court notes that the *Hall* objectors' counsel attempted to improperly "take discovery" on the Court in support of this motion by sending an e-mail to the Court's law clerk. (ECF No. 1802-5, PageID.64699.) The Court is perplexed by the *Hall* objectors' methodology, which is, to use counsel's own words, "just *weird*." (ECF No. 1802-2, PageID.64681 (emphasis in original).)

IV. CONCLUSION

In sum, this Court strives to conduct these cases in a transparent and open manner with strict adherence to the Federal Rules of Civil Procedure, the Judicial Canons of Ethics, and the applicable law. The *Hall* objectors' misinformed, unsupported, and speculative narrative aside, they have not been prejudiced, much less unfairly prejudiced or "uniquely disadvantaged" (ECF No. 1736, PageID.62818) by the Court's decision in this complex litigation to hold two in-chambers meetings with settlement counsel, which do not regard or have any impact on the merits

of any pending motions or objections. Accordingly, the *Hall* objectors' motion is denied with prejudice.

IT IS SO ORDERED.

Dated: June 16, 2021
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on June 16, 2021.

s/William Barkholz
WILLIAM BARKHOLZ
Case Manager

Exhibit B

Transcript of Settlement Counsel Meeting,
March 1, 2021

RE 1450

1 IN THE UNITED STATES DISTRICT COURT.

2 FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

3

4

In Re: FLINT WATER CASES Case No. 16-10444

5 ____________________________/

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7 SETTLEMENT COUNSEL MEETING
BEFORE THE HONORABLE JUDITH E. LEVY

8 UNITED STATES DISTRICT JUDGE
and

9 THE HONORABLE JOSEPH J. FARAH
GENESEE COUNTY CIRCUIT COURT JUDGE

10 Virtual Hearing Via Zoom - Monday, March 1, 2021

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23 ALSO PRESENT: Emily Donnellon

24 REPORTED BY: Darlene K. May, CSR, RPR, CRR, RMR
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1 Monday, March 1, 2021
2 6:07 p.m.
3 -- --- --
4 JUDGE LEVY: Okay. Why don't we get started with
5 calling the case and I think maybe Eva or Casey, one of my law
6 clerks will do that for us.
7 Or I'll do it.
8 THE CLERK OF THE COURT: (Audio muted.)
9 JUDGE LEVY: Hearing no one. Well, calling the Flint
10 Water cases and this relates to the settlement process that's
11 underway.
12 Could I have appearances for plaintiffs?
13 MR. SHKOLNIK: Hunter Shkolnik for liaison counsel,
14 Your Honor.
15 MR. LEOPOLD: Ted Leopold, Your Honor, for co-lead
16 class counsel.
17 JUDGE LEVY: Thank you.
18 MR. WALKER: Renner Walker for the liaison counsel as
19 well, Your Honor.
20 MR. NAPOLI: Paul Napoli for liaison counsel.
21 MR. LANCIOTTI: Patrick Lanciotti for liaison.
22 JUDGE LEVY: Okay. Then ...
23 MR. NOVAK: Paul Novak also for class counsel.
24 JUDGE LEVY: Okay. Thank you.
25 MR. MORRISSEY: Steve Morrissey for the class

1 plaintiffs.
2 JUDGE LEVY: Okay. Thank you.
3 MS. BEREZOFSKY: Esther Berezofsky for class
4 plaintiffs.
5 JUDGE LEVY: Thank you.
6 All right. Well, then let's go to State of Michigan.
7 MR. KUHL: Good evening, Your Honor. This is Richard
8 Kuhl for the State defendants.
9 MS. BETTENHAUSEN: Margaret Bettenhausen also for the
10 State defendants.
11 MR. MENDEL: Todd Mendel for Governor Whitmer.
12 JUDGE LEVY: Okay.
13 MR. DRIKER: Eugene Driker for Governor Whitmer.
14 JUDGE LEVY: Thank you.
15 City of Flint?
16 MR. BERG: Rick Berg for the City.
17 JUDGE LEVY: Thank you.
18 MR. KIM: William Kim for the City, Your Honor.
19 JUDGE LEVY: Okay. And Mr. Klein is muted. But
20 Sheldon Klein for the City of Flint.
21 And we've got Mr. Thompson.
22 MR. THOMPSON: Yes, Your Honor. Craig Thompson for
23 Defendant Rowe.
24 JUDGE LEVY: Okay. Ms. Smith.
25 MS. SMITH: Susan Smith for McLaren Regional Medical

1 Center.

2 JUDGE LEVY: Okay. Have I missed anybody?

3 MR. WALKER: Just one update, Your Honor. I think

4 Mr. Stern got kicked off the call again. He's going to try to

5 rejoin. He said he'd give me a heads-up when he joins.

6 JUDGE LEVY: Okay. And we're joined, of course, by

7 Judge Farah from Genesee County Circuit Court and Deborah

8 Greenspan, who is the Special Master in the case.

9 And the purpose of the meeting is that earlier today I

10 learned that a motion would be filed related to the settlement

11 and it was my intention to try to schedule a status conference,

12 a conversation and opportunity to talk before that motion was

13 filed and that -- I was unable to accomplish that. The motion

14 was filed early this afternoon and our opportunity to meet

15 together could not be held until now, which is 6:00 p.m.

16 So what I'd like to do is indicate that, first of all,

17 this is not an oral argument on the motion.

18 This is not an oral argument on the motion. It was

19 filed. There's, obviously, no response; reply. This is not an

20 oral argument.

21 So what I'd like to do now is go off the record. We

22 will be discussing case management, the processes connected to

23 this motion and what is to follow from its filing. And once

24 we've had this discussion, we can go back on the record with

25 any amount of this material that you think we should put on the

1 record, if any.
2 So Darlene with that, we'll give you a break.
3 (At 6:11 p.m., off the record.)
4 (At 6:37 p.m., court resumes.)
5 JUDGE LEVY: Well, we're back on the record in our
6 status conference. And Judge Farah and I had an opportunity to
7 provide feedback to the counsel who filed the class plaintiff's
8 motion for immediate suspension of the use of the portable bone
9 scanning. And it was determined -- well, I set forth that the
10 motion must be withdrawn as noncompliant with the Court's
11 practice guidelines as well as the duties of the counsel.
12 So that is the upshot of our discussion today. And
13 believe it or not, I'm looking forward to whatever is next in
14 the case. And I do want to mention that I think Judge Farah is
15 awaiting a motion to have Miriam Wolock appointed.
16 JUDGE FARAH: Yes.
17 JUDGE LEVY: So the sooner that happens, the better.
18 Because I think she's already trying to get to work on the
19 issue of foster children.
20 MR. STERN: Yes. Your Honor, this is Corey Stern. I
21 will have that filed tomorrow morning.
22 JUDGE LEVY: Okay. And then there's also, apparently,
23 a motion that Ms. Greenspan met with me and Judge Farah about
24 this afternoon related to those foster children and perhaps
25 getting information and data. I learned in a soul-crushing,

1 heartbreaking moment that there are 800 such children in Flint.
2 So I think everybody needs to be working promptly to see what
3 we can do to make sure they have an opportunity to participate.
4 So somebody's working ...
5 Is that you, Mr. Kuhl?
6 MR. KUHL: Yes, Your Honor. We'll be working on it
7 and we'll get it in as soon as possible.
8 JUDGE LEVY: Okay. That will be great. Because I
9 just don't want to see any of these deadlines go by with people
10 not having the information they need and not being able to
11 participate.
12 So is there anything else?
13 MR. SHKOLNIK: Nothing from the liaison counsel, thank
14 you.
15 MR. LEOPOLD: Nothing from plaintiffs, Your Honor.
16 Thank you for your time. I do appreciate it.
17 JUDGE LEVY: Sure.
18 JUDGE FARAH: Thank you, counselors.
19 MR. LEOPOLD: And Judge Farah you as well.
20 JUDGE LEVY: Yeah.
21 All right. And, thanks, Darlene.
22 And my law clerks.
23 Also, my intern Solomon was with us. Maybe he had to
24 leave for a class.
25 JUDGE FARAH: And my intern, Emily, went home and got

1 on the computer, right away. So thanks to Emily.
2 JUDGE LEVY: Good. Okay. Well, thank you very much.
3 And I'll look forward to those motions and I know Judge Farah
4 is as well.
5 JUDGE FARAH: Thank you, Judge Levy.
6 JUDGE LEVY: Thank you. Bye.
7 (At 6:40 p.m., matter concluded.)
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1 C E R T I F I C A T E

2

3 I, Darlene K. May, Official Court Reporter for the

4 United States District Court, Eastern District of Michigan, do

5 hereby certify that the foregoing is a true and correct

6 transcript, to the best of my ability, from the record of

7 proceedings in the above-entitled matter. I further certify

8 that the transcript fees and format comply with those

9 prescribed by the Court and the Judicial Conference of the

10 United States.

11

12 March 2, 2021 /s/ Darlene K. May

Date Darlene K. May, CSR, RPR, CRR, RMR

13 Federal Official Court Reporter

Michigan License No. 6479

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Exhibit C

Letter to Judge Levy from Michael Pitt dated
May 5, 2021

RE 1802-3

Pitt McGehee
Palmer Bonanni & Rivers
Professional Corporation Attorneys & Counselors

Michael L. Pitt
Peggy Goldberg Pitt
Cary S. McGehee
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May 5, 2021

Via Email: Leslie_Calhoun@mied.uscourts.gov
Hon. Judith E. Levy
United States District Court Judge
Eastern District of Michigan
200 E Liberty St Ste 300
Ann Arbor, MI 48104-2129

Re: In Re Flint Water Cases
Case No. 16-10444

Dear Judge Levy:

Following the status conference held with the Court on May 3, 2021, I have prepared this letter reaffirming my support for the Settlement as co- lead class counsel. As a preliminary matter, it was never my intention to show the Court any disrespect or to violate any of the Court's orders. If there have been errors on my part, I apologize.

As Interim Co-Lead Class Counsel I was instrumental in achieving and being a signatory to the Amended Master Settlement Agreement ("MSA"). I continue to unequivocally support all the terms and conditions of the MSA, including the allocation of settlement awards based on the utilization of bone scan results.

While the XRF device undeniably emits a small dose of radiation as part of the bone scan process, I have been assured by Drs. Jepsen and Todd that if radiation safety protocols are followed, and proper training in the administration and oversight is ensured, the administration of a bone scan using the XRF device is safe for registrants.

While fully supporting the settlement, and appreciating that bone scans are optional for lawyers and their clients, I raised a concern about accessibility of bone scans to all

registrants of the settlement, as the bone scan is a means of allocating awards from the settlement Compensation Plan.

On November 16, 2020, I executed the Amended MSA and Grid with reservations. In an email dated November 16, 2020 I shared with Special Master Greenspan and the other signatories to the Amended MSA, my concerns about the accessibility issue. I wrote:

> The Order Preliminarily Approving the settlement should require that all participants in the Settlement Program should have equal accessibility to award criteria including tests and evaluations which will enable the participant to secure an appropriate compensation award.

My statements did not reflect any retreat from unequivocal support for the settlement or the use of bone scans as a safe, reliable, and an efficient method of securing for all eligible registrants the highest possible award from the Compensation Plan, with proper precautions and equitable access.

Instead, from the beginning I focused efforts to zealously advocate for the unrepresented class members to make sure they have a fair opportunity to secure a bone scan. All my actions and communications have been designed to reduce or eliminate the accessibility objections by mooting them out with the establishment of a second testing site.

Very truly yours,

PITT MCGEHEE PALMER BONANNI & RIVERS

Michael L. Pitt

MLP/rb

Exhibit D

Letter to Judge Levy from Michael Pitt dated
May 13, 2021

Attachment to RE 1789-5

Pitt McGehee
Palmer Bonanni & Rivers

Professional Corporation Attorneys & Counselors

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May 13, 2021

Via Email: Leslie_Calhoun@mied.uscourts.gov
Hon. Judith E. Levy
United States District Court Judge
Eastern District of Michigan
200 E Liberty St Ste 300
Ann Arbor, MI 48104-2129

Re: In Re Flint Water Cases
Case No. 16-10444

Dear Judge Levy:

I write Your Honor to address concerns raised by the objectors regarding the safety aspect of the portable x-ray fluorescence ("XRF") bone scan that is part of the MSA related to the Flint settlement with the State of Michigan, the City of Flint and other settled defendants. As the Court is aware the bone scan is a voluntary evaluation that a participant in the settlement may choose to undergo in order to obtain compensation in the settlement. In this context, the XRF scans are being performed solely for purposes of implementing the settlement.

The Court has already received research and information about bone scan administration, protocols and procedures in the letter submitted by Co-Liaison counsel. Co-Lead Class counsel has also consulted additional experts, Drs. Karl Jepsen at the University of Michigan and Dr. Andrew Todd at Mt. Sinai in New York. Both have confirmed that under the protocols cited by Dr. Specht, as set forth in the Co-Liaison counsel's letter of March 5 and studies cited therein, the use of the XRF bone scan procedure can be used in a safe manner for both children and adults. We understand from these experts that the procedure set forth by Dr. Specht is such that the radiation emitted during the test results in an effective dose that can be considered negligible for most individuals.

As the Court is aware, I have and continue to fully support the terms and spirit of the settlement. Although I have not been informed as to manner in which Mr. Napoli has carried out his test center, as the Court knows, I have and continue to work diligently to establish an additional, safety compliant equivalent bone scan testing site to allow accessibility to all registrants who want to have the testing. I look forward to continuing to work with the Court and all counsel involved in the settlement in ensuring accessibility of the XRF bone scanning for those members of the Flint community who wish to have the bone scans performed.

Very truly yours,

PITT MCGEHEE PALMER BONANNI & RIVERS

Michael L. Pitt

MLP/rb

Exhibit E

Excerpt of Transcript of Status Conference,
May 26, 2021

Excerpt of RE 1800

1 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
2 SOUTHERN DIVISION

3

4 *In Re:* FLINT WATER CASES Case No. 16-10444

5 ____________________________/

6

STATUS CONFERENCE
7 BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE
8 and
THE HONORABLE JOSEPH J. FARAH
9 GENESEE COUNTY CIRCUIT COURT JUDGE
Virtual Hearing Via Zoom - Wednesday, May 26, 2021
10

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8 Hannah Smith, Law Clerk to Judge Farah

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23 REPORTED BY: Darlene K. May, CSR, RPR, CRR, RMR
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1 the United States EPA. Once I have addressed the Underwriters'
2 case, I'll turn to the EPA's motion for interlocutory appeal.
3 So I know that that has been pending for a while and so it's my
4 hope to turn to it relatively soon.
5 MR. WILLIAMS: Thank you, Your Honor.
6 JUDGE LEVY: You're welcome.
7 So the next hearing is going to be June 2nd at 1:00
8 p.m. and that's the motion for class certification. And that's
9 proceeding with respect to portions of the case that did not
10 settle. So that's what that's about. That's different from
11 the final fairness hearing. And then I wanted to mention two
12 additional dates in June. The first is June 23rd at 2:30 p.m.
13 would just be set aside for discovery dispute resolution, if
14 there are any disputes. And June -- I don't know whether I
15 said that -- I don't know if I said Tuesday. I didn't mean to.
16 June 23rd and then June 30th, I think these are both
17 Wednesdays, for our next general status conferences such as
18 this one and that would be at 2:30 p.m.
19 I also anticipate outstanding -- there's a number of
20 things outstanding on the docket and one of them is the Hall
21 objectors motion regarding two meetings that were held in
22 chambers. And for those of you who are watching, courts under
23 Rule 77(b) of the Rules of Civil Procedure are authorized to
24 meet with counsel for, really, a wide variety of purposes,
25 including settlement, just case management, case scheduling

1 conferences and, basically, most everything other than trial.
2 So I don't anticipate needing oral argument on that.
3 But I do want to know that -- I see Mr. Bednarz is here.
4 To know that I will be addressing that right along
5 with everything else.
6 MR. STERN: Your Honor.
7 MR. BEDNARZ: Just to confirm ...
8 JUDGE LEVY: Mr. Bednarz, what?
9 MR. BEDNARZ: Your Honor, I would like to confirm that
10 the motion was unopposed.
11 MR. STERN: Your Honor?
12 JUDGE LEVY: Yes.
13 MR. STERN: I had spoken earlier today with Special
14 Master Greenspan to determine the appropriateness of either
15 raising during this hearing or in writing and with this hearing
16 happening just a few hours later, it was liaison counsel's
17 intent to file a response to that motion. We are responding.
18 Yesterday there was a response filed to the motion for an
19 extension of time related to the bone scan issue. Tomorrow
20 there are responses that are being filed to the various
21 objections as well as a motion for preliminary approval and our
22 response to objections related to the fee petition.
23 There is no one to blame but ourselves, in particular
24 me, for not having yet filed the response to the request made
25 by the Hall objectors. But if possible, if we could have until

1 the end of this week, that would be on Friday, to file a
2 responsive pleading. We don't anticipate it being a very long
3 response. It just got lost in the shuffle of all of the
4 responses that have been filed in the last few days.
5 JUDGE LEVY: Certainly.
6 MR. SHKOLNIK: And Judge Levy, this is Hunter
7 Shkolnik, if I can just add on to that. We also had planned,
8 and there is a lot of drafting going on, response to that
9 motion as part of the big response that's being filed to the
10 reply for the class certification and approval of the
11 settlement. In fact, there's specific references that are
12 included in there opposing this motion. And I think it was
13 just so many motions coming across. As Corey said, some of us
14 conflated them. At least from my office, it was conflating
15 them with the other motions by accident.
16 JUDGE LEVY: Sure. That's okay with me. It's a very
17 uncomplicated straightforward issue. So I'm very happy to
18 receive those by the end of the week. And I think it's
19 important to note that this is a case of great public interest.
20 And so I make every effort to conduct everything that we can
21 possibly do efficiently on the record. I think Darlene can
22 probably tell you how many thousands of pages of transcripts
23 she has generated.
24 It's not a complicated issue and I'm happy to receive
25 your responses either as part of the brief tomorrow or by close

1 of business on Friday. And in terms of ex-parte communication,
2 I can just assure everybody that that is not a part of my
3 judgeship and where people attempt to communicate with me
4 ex-parte, it's shut down.
5 MR. BEDNARZ: Your Honor, I would like to clarify a
6 couple of points on that.
7 THE COURT: Not right now. We're not going to have an
8 oral argument right now. But if I determine that oral argument
9 is needed, you'll certainly be heard.
10 MR. CUKER: Your Honor?
11 JUDGE LEVY: What I'm going to move on to now is a
12 report from the Special Master. And this is an important
13 what -- I want to say something before Ms. Greenspan gives her
14 report which is that on the settlement side of things, a
15 tremendous amount of work is going on both by Ms. Greenspan,
16 counsel and then by the registration entity, Archer, to
17 determine exactly who has signed up for this settlement.
18 So Ms. Greenspan, can you give us a report on where
19 that stands?
20 MS. GREENSPAN: Yes, of course, Your Honor.
21 So as the Court has just indicated, I'm going to give
22 a report on the status of the registration process, what we
23 know today, and the process that everybody has been -- the
24 parties and the claims administrator have been engaged in to
25 ascertain the actual registration data. It sounds -- I think

1 there is any action you're requesting from the Court in the
2 future.
3 MS. DEVINE: Thank you very much.
4 JUDGE LEVY: You're welcome.
5 So the last issue that I have and then I'll, of
6 course, turn to Judge Farah and see if there is anything you
7 want to bring up.
8 But is this issue of show cause order that I issued.
9 And that related -- now we're talking about getting in the
10 weeds. We're down in the blades of grass of our case. And
11 sometime ago, in October of 2020, there was a motion for a
12 protective order to limit access to certain depositions. And
13 that was filed by Mr. Stern and Mr. Shkolnik and it related to
14 depositions of doctors and others who had examined their minor
15 plaintiffs.
16 And at a hearing on October 2nd of 2020, I indicated
17 that there would be a limit on who could attend those
18 depositions in light of the fact that these are minor children,
19 their psychiatric records, their developmental history and
20 their medical records would be at issue at those depositions.
21 Now, of course, when somebody chooses to bring a case
22 and they go to trial, all of that becomes a matter of public
23 record, but back in October, we're not yet at the trial and it
24 was my determination that at this stage of the proceeding those
25 children's personal psychological, medical, et cetera records

1 should be protected. So I ordered a limit to the individuals
2 who could be at the deposition and it was limited to counsel on
3 the bellwether cases. And lo and behold through no one's
4 fault, the deposition transcripts were posted or made available
5 to a wider group. So that was brought to my attention and that
6 was on October 21st that that was brought to my attention and
7 we held a hearing that Mr. Pitt was at and Mr. Washington was
8 at, Val Washington.
9 I issued -- I required that they return and/or destroy
10 the electronic copies of those depositions that were in their
11 possession and I entered an order on the docket, docket entry
12 1290, indicating that that was the outcome of the hearing.
13 Now fast forward about six months and in April 24th
14 Mr. Cuker filed a motion that was to review and respond to
15 hourly billing and costs for discovery in the bone scan, and
16 that he did that on behalf of Mr. Lowery, Sr. and in it is
17 reference to one of those deposition transcripts. And for the
18 purposes of our hearing today, Mr. Cuker --
19 And, Ms. Christopherson, you're here from the Val
20 Washington law firm?
21 (No verbal response.)
22 MS. CHRISTOPHERSON: Sorry. I was on mute, but yes.
23 JUDGE LEVY: Okay. And of course, Mr. Pitt is here as
24 well.
25 That disturbed me a great deal because I had entered

1 an order that the transcripts be destroyed and limited to
2 counsel for the bellwether cases. And so I guess what I was
3 saying is I'm not so concerned about what the content was of
4 the deposition that was used. We'll get to that later. And it
5 doesn't matter to me now whether what was used was a child's
6 psychiatric record or not. The fact is the Court had entered
7 an order that that deposition transcript was to be destroyed
8 and not used for any purpose other than legitimate purposes
9 related to preparation for that bellwether trial.
10 So I issued an order to show cause for Mr. Cuker to
11 let me know how he got this. And Mr. Cuker responded in docket
12 entry 1720 on April 30th of 2021 and included a series of
13 E-mails explaining to me how he got it.
14 And the declaration disturbs me a great deal and the
15 E-mail does, too. Why? Because it appears that the parties to
16 getting this -- providing this to Mr. Cuker and Mr. Cuker's
17 decision to use it, didn't care whatsoever about the Court's
18 order. And that's the part that needs to be remedied.
19 So how did it happen? As I read Mr. Cuker's
20 declaration and attachments, it turns out that one of the
21 deposition transcripts, Dr. Specht, S-p-e-c-h-t, came up in one
22 of the *Daubert* motions that was filed related to the motion for
23 class certification. And VNA filed that motion. They did it
24 appropriately in terms of sealing the transcript. But in order
25 to respond to that, the co-lead class counsel needed to look at

1 the deposition. So they asked Mr. Stern, who had taken the
2 deposition, who is counsel to the bellwether cases, who
3 legitimately had a copy of it, whether they could look at it.
4 He, Mr. Stern, grants them permission to do that
5 because they are on the same side of the V. in this case
6 defending the prosecution of these cases. And in order to
7 factually get the transcript to Mr. Leopold, who had requested
8 it, and Mr. Stern, they asked Ms. Devine to post it or to make
9 it available to them. Which she did in an E-mail and said that
10 it should be maintained as highly confidential. And there's a
11 small error there, possibly, which is not the point of our
12 hearing which is it is beyond highly confidential. But that's
13 not really the point of our hearing.
14 So Ms. Devine does that and that's pursuant to the
15 request of counsel and that much is not the problem. And she
16 then -- so the E-mail that Ms. Devine sends permits this to go
17 to Mr. Pitt and Mr. Leopold and the colleagues they have on the
18 class case working on this deposition -- or on the response to
19 the *Daubert*. Well, from there Mr. Pitt then sends it to Val
20 Washington.
21 This is where we have a violation of the Court's
22 order, Mr. Pitt. Because Mr. Washington is not counsel on any
23 of the *Daubert* issues that this was being provided to you for.
24 So there was no exception to the Court's order to destroy this
25 deposition that would have allowed you to send it to

1 Mr. Washington.
2 So what I find disturbing is that at no time since
3 this happened has Mr. Pitt contacted the Court to explain one
4 way or another how this happened or why it happened. But let's
5 keep going.
6 Mr. Washington then sends it to Mr. Bern, Mr. Monroe
7 and Mr. Cuker, two of whom at least are on the call today.
8 And they ask whether -- how he got the deposition transcript.
9 Mr. Cuker asks whether there's a protective order and
10 Mr. Washington states, "I have been told there's no protective
11 order on these deposition transcript."
12 So, Ms. Christopherson, we have a problem with your
13 law partner here in that he was at the hearing where I
14 instructed that the deposition transcript be destroyed. So
15 there's a serious problem there.
16 And he says, "There's no protective order. Mark Cuker
17 wants to verify that. Who told you that?"
18 And Val Washington answers, "Michael Pitt told me.
19 But it is marked highly confidential he says in an E-mail and
20 so be sure to follow the Court's rules if you are going to post
21 it."
22 So what happens next is the -- we won't even get to
23 the way in which it was filed, which did not follow the Court's
24 sealing requirements. That has later been fixed.
25 Mr. Cuker, you FedEx'd the unsealed to -- where is it

1 in your mind, where do I sit as a judge?
2 MR. CUKER: Well, Your Honor, you sit in Ann Arbor. I
3 apologize.
4 JUDGE LEVY: Yeah. I think I told you that.
5 MR. CUKER: Can I -- I just wanted to say that, you
6 know, in my experience with other federal courts, they don't
7 like sensitive documents filed electronically because they can
8 wind up on the internet. So in my experience we do this by
9 hard copy.
10 But I apologize, it should have gone to -- obviously,
11 should have gone to Ann Arbor. And given COVID and all the
12 restrictions on hard mail, obviously, it did not make it on to
13 the docket timely even though we FedEx'd it timely. And we
14 copied all counsel on that motion timely.
15 THE COURT: Well, here's the situation, what I'm
16 asking of you is just to follow the written rules, Federal
17 Rules of Civil Procedure, Local Rules in the Eastern District
18 of Michigan and the CM/ECF electronic filing rules.
19 And our requirements require that you file it under
20 seal with a request to the Court to proceed with it in the
21 manner that you wish to proceed with it in and that didn't
22 happen.
23 That part is not -- that's just a let's all follow the
24 rules kind of directive. And I'll say something that I've said
25 many times before which is what these rules of procedure do is

1 they level the playing field among all lawyers and pro se
2 individuals. That if people follow the rules, you have as much
3 power and authority in a case as anyone else. And when you
4 don't follow the rules, it breaks down and there have to be
5 consequences for that.
6 So I guess what I'm interested in hearing, Mr. Cuker,
7 is what happened is in your declaration at no point do you
8 acknowledge that you did not have the authority to have this
9 deposition transcript.
10 MR. CUKER: Your Honor, let me.
11 THE COURT: Yeah, go ahead.
12 MR. CUKER: Is it my turn, Your Honor?
13 JUDGE LEVY: Yes.
14 MR. CUKER: First I want to make an objection on the
15 record to this being heard at all at this time until Your Honor
16 rules on the whole objector's motion to disclose what happened
17 at the conference on May 3rd, to which I was not invited.
18 You talked about a level playing field, part of a
19 level playing field is everybody gets to hear what everybody
20 else has to say. That conference was held the next business
21 day after my responses were ordered to show cause. It appears
22 highly likely that the order to show cause was discussed at
23 that conference. I don't know what was said there. I don't
24 know what was said behind my back. I do know that no one
25 representing the interests of objectors was present and I think

1 having any proceeding on this issue before there's been full
2 disclosure of what happened on May 3rd is improper.
3 Having said that, let me answer Your Honor's question.
4 As I interpreted the E-mail exchange between Mr. Stern and
5 Alaina Devine, he was releasing the trans- -- Ted Leopold said
6 we need to modify the court order. I can read from the E-mail
7 if you'd like but I'm sure Your Honor is familiar with it.
8 "We need to modify your court order," Corey Stern
9 said.
10 "No, you don't need to do that. I'm releasing it
11 subject to the confidentiality order."
12 It's a 39-page confidentiality order. I read it very,
13 very carefully. I complied with every word of the
14 confidentiality order, but under the confidentiality order I
15 had a right to see what's in the deposition. And more
16 importantly there was 95 percent of what is in that deposition
17 has nothing do with any minors' medical condition and
18 everything to do with the grounds for the objections that are
19 being raised here.
20 So in my view Mr. Stern was -- Mr. Stern could have
21 redacted that personal health information from the transcript.
22 He chose not to. That was his call. But when he released the
23 deposition to be posted on the share file site, which a whole
24 bunch of plaintiffs' lawyers would have access to in my view,
25 he was waiving the protection of the Court's order and I was

1 permitted to use it in accordance with the confidentiality
2 order.
3 JUDGE LEVY: And here's the problem with that is that
4 he doesn't have the authority to set aside the Court's
5 subsequent order that said destroy these copies. Mr. Stern
6 can't modify that unilaterally. And so the fact is that the
7 data that you used from Dr. Specht's deposition is not personal
8 health data. And so -- which I'm thankful for. So that's not
9 what we're here to debate.
10 But what we are here to debate is, I guess, if I open
11 up the docket right now, which I have opened ...
12 In the *Carthan* case alone we are up to 1,786 docket
13 entries. And there are 85 other dockets that I have in the
14 Flint Water litigation.
15 And in order to be qualified and competent in this
16 case, it simply requires that you review the relevant docket
17 entries in order to proceed to represent your clients. I think
18 that's the message that I have. Is you have chosen to enter a
19 complex litigation. You're welcome to be here. That then
20 requires that you follow the rules and do the additional work
21 of tracking what has been ordered relevant to what you're
22 trying to do.
23 So the position that you find yourself in is having
24 violated not the confidentiality provisions in those many pages
25 you cited, but the separate one sentence order that indicated

1 that copies of this particular transcript were to be destroyed.
2 And so in terms of, Mr. Pitt, I don't know if you wish
3 to say anything about what would have -- about what happened
4 here.
5 MR. PITT: Sure. Thank you, Your Honor. And good
6 afternoon.
7 So on May 3rd there was an off the record conversation
8 and the Court permitted me to provide an explanation for the
9 sharing of the transcript with counsel, Val Washington, and I
10 was thankful that the Court gave me the opportunity on May 3rd
11 to explain that and, unfortunately, it wasn't on the record.
12 So the record -- my explanation is going to have to be repeated
13 in some fashion.
14 But at that hearing we talked about the remedy and the
15 Court asked me to write a letter, which I did. The Court
16 accepted the letter and, you know, I believe that the issue was
17 closed.
18 JUDGE LEVY: Yeah. And Mr. Pitt, let me ask you to
19 stop right there. The May 3rd, it was not a hearing. And let
20 me be really clear about what it was, which was you had taken a
21 position contrary to your signature on the settlement and that
22 raised deep concern. And so that hearing was not about
23 Mr. Washington. It was not about Mr. Cuker. I would never
24 have done that with Mr. Cuker and Mr. Washington not present.
25 So I think things have gotten a little mixed up here in that

1 regard.
2 So, please --
3 MR. PITT: It was a discussion --
4 THE COURT: -- rest assured, Mr. Cuker, it was not a
5 hearing.
6 MR. PITT: It was simply a discussion about the
7 transcript --
8 JUDGE LEVY: Mr. Pitt, I'm going to have to have you
9 not speak when I'm speaking.
10 MR. PITT: Okay.
11 JUDGE LEVY: Let me tell you how it works. If you
12 speak when I speak, Darlene only takes me down and it's as if
13 you're not here. So try to remember that. If you speak when I
14 speak, her direction, if possible, is just to take down the
15 judge and we know where -- okay.
16 So I just want to be very clear to Mr. Cuker and
17 Ms. Christopherson, there was no hearing. It was a matter of
18 sorting out what direction you wish to go in and so we don't
19 need to go into that any further. You made it clear that you
20 support the settlement one hundred percent. You believe bone
21 scans are safe and you have done the research with experts to
22 determine that portable bone scans are safe and that's what you
23 told me. And that it was not your intention to go in any other
24 direction.
25 So in light of that -- and I know that Mr. Washington

1 isn't here. So I can't very well ask Ms. Christopherson to say
2 much on his behalf unless she would like to.
3 But what I'm doing simply is reminding each of you of
4 your professional duty in a complex litigation to stay on top
5 of what is on the docket, the decisions the Court has made and
6 the applicable rules and we'll leave it at all that.
7 I do -- and I'm interested in hearing -- I went back
8 this morning to reread the five pages of the Dr. Specht
9 deposition that Mr. Cuker filed under seal.
10 And I agree with you, Mr. Cuker, they're not related
11 to a particular individual's case or bone scan. So I am
12 interested in hearing from Mr. Stern and Mr. Shkolnik as to
13 whether you think that should remain under seal. And I can
14 give you, I don't know, eight or 10 days to respond to that.
15 There's page -- a couple of -- like, 46, 47, 48 and
16 then 138 and 139, those page numbers.
17 Mr. Stern?
18 MR. CUKER: 142, maybe.
19 JUDGE LEVY: Maybe.
20 MR. CUKER: 140 also, Your Honor.
21 JUDGE LEVY: Yeah.
22 MR. STERN: It would be better if I had eight to 10
23 days, Your Honor. Because if I were to answer the question
24 right now, I would be acting out of emotion in light of a lack
25 of taking responsibility for certain things rather than what is

1 actually at issue here in terms of the substance of those
2 pages. So I would appreciate a little bit of time.
3 JUDGE LEVY: Okay. Well, if you could file that by
4 Tuesday, June 8th and we'll put that in an order.
5 And Mr. Shkolnik, I don't know where you are -- there
6 you are.
7 MR. SHKOLNIK: Judge Levy, I defer to Mr. Stern
8 because I think I need to look at the pages to see and the fact
9 that none of the lawyers took responsibility for violating your
10 orders, I think would leave me to say something I don't want
11 to.
12 JUDGE LEVY: Yes. I find it disturbing as well, but
13 that's what we have. And so I just -- you know, the record
14 will reflect that I have admonished you to follow the Rules,
15 take responsibility where -- I mean, there is so much going on
16 in this case that any one of us, myself first, can let things
17 slip through the cracks or can miss something that I need a
18 reminder on and I need them constantly.
19 So that's not the problem. The problem is not taking
20 responsibility when an error has taken place.
21 MR. CUKER: Your Honor, could I ask a related
22 question?
23 JUDGE LEVY: Sure.
24 MR. CUKER: Why was Mr. Pitt's letter to the Court not
25 on the docket?

1 JUDGE LEVY: It was not on the docket -- there's no
2 reason. No particular reason. I can send it out. Or I can
3 docket it.
4 MR. CUKER: There was a very large filing by liaison
5 counsel yesterday about 9:56 p.m. in response to our motion for
6 extension of time on bone scans and medical causation reports.
7 And that disappeared from the docket in midday today. Do you
8 know what --
9 JUDGE LEVY: There was an error. I can explain that.
10 They contacted the Court. There was an error in the filing, an
11 error in the filing and they're going refile it. I don't know
12 if they have yet or not.
13 MR. CUKER: Well, Your Honor, typically, when there's
14 an error in the filing there's a note on the docket to indicate
15 something's filed in error and removed. This just disappeared
16 like it never existed.
17 JUDGE LEVY: All I can say is they -- it didn't
18 disappear from my end. I can still see it. So I don't know.
19 MR. CUKER: We can't. We were looking at it literally
20 at one moment and the next time it was gone.
21 MR. SHKOLNIK: Judge Levy?
22 JUDGE LEVY: Terrific. Okay. Thank you for sharing
23 that.
24 I think they're refiling. I guess I can ask. I think
25 it was Mr. Lanciotti.

1 Are you going to refile it or is the Court?
2 MR. LANCIOTTI: I think, Your Honor, we were waiting
3 on direction from Ms. Calhoun.
4 JUDGE LEVY: Okay.
5 MR. LANCIOTTI: But when instructed, we will do so
6 immediately.
7 JUDGE LEVY: Okay.
8 MR. SHKOLNIK: And Judge Levy, this is Hunter
9 Shkolnik. Just so you understand, Mr. Cuker was advised of
10 this by me that there was a filing error on our part and we
11 were trying to clarify it with the Court and that we were
12 getting followup instructions today. So to make it sound like
13 this is something surprising, he didn't even know it wasn't on
14 the docket until I told him.
15 JUDGE LEVY: Okay.
16 MR. SHKOLNIK: And I said before you do anything with
17 the copies you have, please be aware we may have filed
18 something that should have been under seal and we're dealing
19 with it. That's all.
20 JUDGE LEVY: Okay.
21 MR. CUKER: Can I just ask one other question?
22 JUDGE LEVY: Sure.
23 MR. CUKER: The filings refer to two letters that
24 Mr. Pitt wrote to the Court. One dated May 5th and one dated
25 May 13th. Are both of those going to appear on the public

1 docket?

2 JUDGE LEVY: I don't know. But thank you for asking

3 and I'll let you know. All right.

4 MR. BEDNARZ: Your Honor?

5 JUDGE LEVY: Yeah.

6 MR. BEDNARZ: Frank Bednarz for the ...

7 JUDGE LEVY: For the Hall objectors.

8 MR. BEDNARZ: I have a related question in regards to

9 following the Court orders and that is that one of the Pitt

10 letters, of course, is on the docket and the other one was

11 forwarded by Mr. Shkolnik who then later advised that the

12 documents should be destroyed and Your Honor --

13 JUDGE LEVY: You don't have to destroy it. I can

14 answer your question.

15 MR. BEDNARZ: Thank you.

16 JUDGE LEVY: That's all right.

17 MR. BEDNARZ: And I would also point out that these

18 letters, the one that was filed and the one that wasn't filed,

19 they are themselves ex parte communications and they suggest

20 additional ex parte communications.

21 JUDGE LEVY: No, they don't. But thank you.

22 I mean, they will be posted or filed or we'll do what

23 is appropriate. I really appreciate your concern, though.

24 Judge Farah, is there anything you wish to bring up

25 today?

1 JUDGE FARAH: No, Judge Levy. I would just echo your
2 sentiments about the importance of following not violating
3 court orders and if somebody thinks an order was improvidently
4 either because there was no hearing or some other shortcoming
5 as alleged, the appropriate task is either to ask for
6 reconsideration or appeal the order. It is not to unilaterally
7 violate it.
8 JUDGE LEVY: Yeah, thank you.
9 MR. PITT: Your Honor, may I be heard? Your Honor?
10 JUDGE LEVY: On what subject?
11 MR. PITT: On the question of what happened on May
12 3rd.
13 JUDGE LEVY: No. I mean, feel free to say -- I think
14 we've covered what happened on May 3rd.
15 MR. PITT: I just want to make it clear, if I may
16 speak?
17 JUDGE LEVY: Sure.
18 MR. PITT: On May 3rd, this issue came up. I was
19 permitted to give a somewhat lengthy explanation for the
20 circumstances that led to the sharing of the transcript with
21 Mr. Washington and after the Court heard the explanation, I got
22 the impression from the Court at that hearing that the matter
23 was closed and we then went on to the next topic and that is
24 the issue of whether I was in full support of the settlement
25 and the letter was the product of that discussion.

1 JUDGE LEVY: And you made an error with respect to the
2 letter which is that you actually -- I think, Mr. Bednarz
3 raises a good point. You mailed it only to me without copying
4 it to the other counsel. I then had my law clerk --
5 I corrected it, Mr. Bednarz. So thank you. I
6 corrected --
7 MR. PITT: Your Honor?
8 JUDGE LEVY: Stop, Mr. Pitt. I corrected it
9 immediately and sent it out to all the other counsel.
10 But in the future, Mr. Pitt, if there is a need to
11 correspond with the Court copy, the other counsel.
12 MR. PITT: I will do so. But on that particular day,
13 you asked me to send it to you for review.
14 JUDGE LEVY: Yes. But under no circumstances do I
15 communicate one-on-one. I mean, that's a basic. That's 101 of
16 our Rules of Professional Conduct.
17 MR. PITT: I was following the Court's instruction
18 that day.
19 MR. CUKER: Obviously, had there been a transcript of
20 the hearing we wouldn't have to --
21 JUDGE LEVY: All right. Okay. Certainly. Certainly.
22 But, you know, there's something remarkable about this case
23 which is that there are so many moving pieces. And, for
24 instance, when we talk on the next 10 days about, do you
25 want -- do you think you're going to want a lunch break at

1 12:30 or 1:00 for the bellwether trials, those are things
2 that's simply -- if we tried to conduct those types of things
3 on the record, we would never get done with our work.
4 So my job is to balance this case. The foot on the
5 pedal going forward, foot on the brake when we need it and,
6 otherwise, we're progressing under all of the same rules that
7 apply to all cases. And that's what I'm doing to manage it and
8 I'm going to keep going with Judge Farah's assistance as well.
9 So I appreciate hearing from all of you and the
10 criticism I get as a judge sometimes is just letting arguments
11 go on too long. So in response to that criticism, I think
12 we'll call it a day.
13 MR. MONROE: Judge?
14 JUDGE LEVY: Yeah.
15 MR. MONROE: I apologize on that note. I just want to
16 address the co-liaison responses they'll be filing. I haven't
17 seen it yet. I did see it last night and now I don't have it
18 on my docket. But can we calculate the time for a reply from
19 when it is finally filed, Judge?
20 JUDGE LEVY: Absolutely.
21 MR. MONROE: Okay. Thank you for that.
22 JUDGE LEVY: Good question. We'll follow the Local
23 Rules and the reply brief will be due -- is it 10 days? Seven
24 days?
25 MR. CUKER: I think we'll ask for another seven days.

1 We gave them two weeks, but we'll deal with that before Your
2 Honor.
3 JUDGE LEVY: Okay. I appreciate that.
4 MR. MONROE: Thank you, Judge.
5 JUDGE LEVY: All right. Thank you, everybody. And I
6 hope everybody enjoys the weekend just a little bit.
7 MR. NAPOLI: Thank you, Your Honor.
8 JUDGE LEVY: Bye.
9 (At 3:50 p.m., matter concluded.)
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1 C E R T I F I C A T E

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3 I, Darlene K. May, Official Court Reporter for the

4 United States District Court, Eastern District of Michigan, do

5 hereby certify that the foregoing is a true and correct

6 transcript, to the best of my ability, from the record of

7 proceedings in the above-entitled matter. I further certify

8 that the transcript fees and format comply with those

9 prescribed by the Court and the Judicial Conference of the

10 United States.

11

12 May 28, 2021 /s/ Darlene K. May
Date Darlene K. May, CSR, RPR, CRR, RMR

13 Federal Official Court Reporter
Michigan License No. 6479

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Certificate of Service

I hereby certify that on June 25, 2021 I electronically filed the foregoing petition with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system.

I will also cause to be filed today a copy of this petition on the district court's docket using the CM/ECF system which will serve the foregoing petition upon the district court and all counsel of record in the district court.

Executed on June 25, 2021.

/s/ Adam E. Schulman
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