No. 19-4097

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION

ALBANY COUNTY, NY, Negotiation Class's Class Representatives,
CO-LEAD NEGOTIATION CLASS COUNSEL, and
CO-NEGOTIATION CLASS COUNSEL,

Plaintiffs-Appellees,

v.

MCKESSON CORPORATION, CARDINAL HEALTH, INC., AMERISOURCEBERGEN DRUG CORPORATION, PRESCRIPTION SUPPLY, INC., DISCOUNT DRUG MART, INC., WALMART, INC., WALGREEN COMPANY, WALGREEN EASTERN CO., INC., CVS PHARMACY, INC., CVS INDIANA, LLC, CVS RX SERVICES, INC., and RITE AID OF MARYLAND, INC., D/B/A RITE AID OF MID-ATLANTIC CUSTOMER SUPPORT CENTER,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division
Case No. 1:17-md-2804

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

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CORPORATE DISCLOSURE

Pursuant to Sixth Circuit Rule 26.1, *Amicus Curiae* Lawyers for Civil Justice, makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome?

No.

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STATEMENT OF THE INTEREST[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ's primary purpose is to advocate for fairness and balance in the administration of civil justice, often by proposing changes to the Federal Rules of Civil Procedure through the Rules Enabling Act process and by the filing of amicus curiae briefs in cases involving the interpretation and application of the Federal Rules of Civil Procedure to issues in civil litigation. Since its founding in 1987, LCJ has become a leading voice on federal rule reform. LCJ has submitted written comments and participated in public hearings related to the Civil Rules Advisory Committee's work to develop the 2018 amendments to Rule 23, and has filed amicus briefs on issues related to Rule 23 and its interpretation. LCJ has also urged the adoption of clear, uniform rules that would apply to MDLs benefiting all stakeholders by ensuring the same fairness, clarity, and certainty that the Federal Rules of Civil Procedure are intended to assure for other civil cases.

[1] LCJ certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief.

This appeal arises at the intersection of LCJ's experience with class actions and MDL procedures. Article III created federal courts of limited powers when it vested them with the "judicial power." The judicial power does not extend to judicial efforts to solve national social crises untethered to the exercise of jurisdiction over specific cases and controversies as governed by governing statutes, case law, and court rules. The order certifying a negotiation class adopted here falls outside of Article III's limits, is unauthorized by 28 U.S.C. § 1407, and is inconsistent with the Federal Rules of Civil Procedure.

LCJ's perspective in this case is based on the expertise it has gained through its own policymaking efforts, the research that underlies its views, and the collective experience of its members who are frequently involved in litigation in the federal courts under the federal rules as currently written. LCJ has a deep knowledge of and interest in the process of civil litigation and how the rules, and a correct interpretation of the rules, can assure a just, inexpensive, and speedy outcome and avoid litigation abuses.

Appropriate certification in class actions is of central concern to LCJ's membership. LCJ's concerns helped to prompt rule changes relating to class actions. LCJ members have testified at various hearings of the Civil Rules Advisory Committee and Standing Committee on the Rules of Civil Procedure

about the abuses that arise through the certification of class actions when common issues do not truly predominate. In addition, LCJ has deep knowledge of the current status of MDLs, which now represent more than half of the civil caseload in federal courts, and of the problems created for litigants in MDLs, when ad hoc procedures, largely judge-made and inconsistently applied, are substituted for the Federal Rules of Civil Procedure's clear, uniform, and transparent procedures.

If allowed to stand, the district court order will result in certification of a negotiation class that amounts to a judicial usurpation of power beyond anything contemplated in the U.S. Constitution, 28 U.S.C. § 1407, or the Federal Rules of Civil Procedure. Certifying a negotiation class, as was done here, impedes our civil justice system's ability to function so that disputes are resolved using clear and predictable rules that are known in advance and that create a fair forum for cases and controversies that will be decided under neutral principles of law.

Accordingly, LCJ writes from its unique perspective to urge this Court to reverse the district court's order certifying a "negotiation class" because it is inconsistent with the standard for certification of classes as embodied in the rules and as articulated by the Supreme Court and this Court. Prompted by its obligation to assist the Court in cases involving the interpretation of Federal

Rule of Civil Procedure 23 and the rules as applied to MDLs, LCJ has filed a motion for leave to file this brief along with the brief requesting this Court to grant its motion for leave to file this brief. LCJ believes that this brief, which it proffers in support of Defendants-Appellants, will assist the Court in resolving the issues presented.

ARGUMENT

THE DISTRICT COURT IS NOT EMPOWERED BY ARTICLE III OF THE CONSTITUTION, 28 U.S.C. § 1407, OR FEDERAL RULE OF CIVIL PROCEDURE 23 TO CERTIFY A NEGOTIATION CLASS IN THE MANNER ATTEMPTED HERE

The first inquiry, when analyzing judicial decision making and the law, is: "Where does the judge find the law that he embodies in his judgment?" BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 14 (1921). When the source of the law is "supplied by the constitution or by statute," the judge's "duty is to obey." *Id.* And it is a "basic principle of the administration of justice that like cases should be treated alike." RUPERT CROSS, PRECEDENT IN ENGLISH LAW 14 (1968). See also, BRYAN A. GARNER, ET AL, THE LAW OF JUDICIAL PRECEDENT 21 (2016). "In a democracy, citizens and litigants must have confidence in the rule of law, which requires that a judge's decisions must not be – and must not seem to be – arbitrary, based on personal preferences, or unbounded." *Id.*

Yet here, the district court issued an order certifying a negotiation class untethered to any source of law that is embodied in the court's decision. And in contrast to virtually every jurisprudential explanation of the nature of the law, which requires that like cases be treated alike, the district court barred its certification order from being cited by the parties or non-parties or treated as precedent in any opioid-related litigation. In other words, the district

court's order is predicated on factual findings and legal conclusions – but those factual findings and legal conclusions cannot be used by the parties or non-parties in any opioid-related litigation. Thus, like cases will not be treated alike. This is not the rule of law but its antithesis.

The district court is not empowered by the Constitution, 28 U.S.C. § 1407, or Federal Rule of Civil Procedure 23 to issue a non-precedential order that creates a negotiation class of "all counties, parishes, boroughs (collectively, 'counties'); and all incorporated places, including without limitation cities, towns, townships, villages, and municipalities (collectively 'cities')", for specified claims and issues against specified defendants. (Order Certifying Negotiation Class and Approving Notice, RE 2591, Page ID # 413619.) The district court has "encouraged the parties to settle the case" because settlement "would expedite relief to communities so that they can better address this devastating national health crisis." (Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413579.) The district court embraced a "creative" approach to "undertake the class certification and opt-out process prior to a settlement being reached…" to overcome what it deemed to be "obstacles" to settlement. (*Id.* at Page ID # 413580.) From the outset of this opioid MDL, the district court has pushed settlement as a means of doing "something meaningful to abate this crisis…." (Transcript of 1/12/18

Proceedings, RE 71, Page ID # 462.) The district court's desire to abate a "national crisis" does not dispense with the constraints inherent in the rule of law or permit the court to ignore or flout the limits of its "judicial power," and the strictures set forth in 28 U.S.C. § 1407 and Federal Rule of Civil Procedure 23.

A. Article III limits the jurisdiction of the federal courts to the exercise of the judicial power, which does not empower a district court to certify a negotiation class unrelated to any specific case and under a relaxed standard in a non-precedential order

Article III of the Constitution limits the judicial power of the United States to the resolution of "Cases" and "Controversies," and "'Article III standing ... enforces the Constitution's case-or-controversy requirement.'" *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 (2006) (quoting *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 11 (2004)). "'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines v. Byrd,* 521 U.S. 811, 818 (1997) (quoting *Simon v. Eastern Ky. Welfare Rights Organization,*426 U.S. 26, 37 (1976)).

The Constitution confers limited authority on each branch of the Federal Government. Although the Constitution does not fully explain what is meant by "[t]he judicial Power of the United States," Article III, Section 1, it specifies

that this power extends only to "Cases" and "Controversies," Article III, Section 2. These limits prevent the judiciary from impinging on the other branches and serve an important function in maintaining the equilibrium between the three branches of government. *Spokeo, Inc. v. Robins*, __ U.S. __; 136 S. Ct. 1540, 1547 (2016). Article III is intended to "limit the federal judicial power to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 192 U.S. 83, 97 (1968)(citation and quotation marks omitted).

Yet here, the district court certified an MDL class attributing its order to one case though that plaintiff had already settled with some defendants named as part of the class. Summit County's complaint was "the reference for analysis of the claims and issues suitable for class certification" because many plaintiffs filed complaints "that are substantially identical in relevant passages." (Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413590, n 3.) In the district court's view, Summit County's pleadings were "common across many, if not most, of the MDL litigants and putative class representative…" (*Id.* at Page ID # 413591.)

But this negotiation class is not based on or tethered to any specific case. The district court simply assigned the Summit County case number to its

order as a way to group all MDL cases, though they are not consolidated. This was apparent from the district court's explanation of why he attributed the Summit County case number to his order. (Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413621.) The district court rejected the argument that "the present motion is not tethered to a specific complaint" by restating the defendants' point as an argument that "there is an absence of relevant pleading in this matters." (*Id*. at Page ID # 413589.)

The district court missed the point, which was that the court's rulings and orders must be tethered to a particular complaint because its judicial power is limited to resolving particular cases or controversies. The MDL is not a case – it is comprised of many individual cases that are transferred to one district court under 28 U.S.C. § 1407. Cases that are transferred to a district court for MDL pretrial proceedings retain their separate identities. *Gelboim v. Bank of American Corp*., 574 U.S. 405 (2015). See also *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586, 590-592 (6th Cir. 2013). Thus, the district court is not empowered to certify a class outside the context of a specific case.

And "curiouser and curiouser,"[2] the certification "is not meant to affect any on-going litigation." (Order Clarifying Negotiation Class Certification Order, RE 2713, Page ID # 419214.) The district court explained that its order would not stay or impair any action or proceeding in any court. (Order Certifying Negotiation Class and Approving Notice, RE 2591 Page ID # 413623.) Most curious of all, the district court ordered "no class member of any party, or counsel to a party, to this proceeding may cite this Order or the accompanying Memorandum Opinion as precedent or in support of, or in opposition to, the certification of any class for any other purpose in any opioids-related litigation by or against any party thereto." (*Id.*) Non-parties were also "informed that this Order and the accompanying Memorandum Opinion are not intended to serve as precedent in support of, or in opposition to any motion for class certification of any type pursued in any court on opioid-related matters." (*Id*. at Page ID # 413623-413624.)

The district court explicitly acknowledged that it entered the order because obstacles to settlement prompted the "Special Master, in conjunction with experts and the parties in the case," to develop "an innovative solution: a new form of class action entitled 'negotiation class certification.'"

[2] "'Curiouser and curiouser!' cried Alice…." Lewis Carroll, Adventures in Wonderland & Through the Looking Glass, www.goodreads.com/quotes/714245-curiouser-and-curiouser-cried-Alice

(Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413579.) After encountering obstacles to his efforts to settle the litigation, the district court's expert produced a "scholarly version of the idea" of certifying a negotiation class. *Id.*, citing Francis E. McGovern and William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stateholders* (Duke Law Sch. Pub. Law & Legal Theory Series, Paper No. 2019-41, 2019), https:papers.ssrn.com/so13/papers.cfm?abstract_id=3403834. The district court tried to justify the order creating the negotiation class by asserting that it is not coercive and that it provides "an option – and in the Court's opinion, it is a powerful, creative, and helpful one." (Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413588.)[3] The very power – which derives from the *in terrorem* effect of certification – is troubling, and a reason to use caution in certifying a class.

The district court also took cover from dicta in *In re National Prescription Opiate Litigation*, 927 F.3d 919, 923 (6th Cir. 2019); the opinion merely stated that the district court had expressed a desire to settle the litigation. Reliance on the statement as implicit support for creation of a

[3] The circular nature of the authority cited (a special master facing obstacles in his role in an MDL publishes an article proposing certification of a negotiation class that is then cited by the court that appointed the special master as support for its certification order) should give pause.

negotiation class untethered to any complaint and without the rigorous scrutiny required under Rule 23 is entirely misplaced. Moreover, this Court specifically stated that if the district court's ruling on disclosure of ARCOS data was motivated by "a desire to use the threat of publically disclosing the data as a bargaining chip in settlement negotiations," then its decision amounted to an abuse of discretion. *In re National Prescription Opiate Litigation*, 927 F.3d 919, 933 (6th Cir. 2019). Likewise, its effort to certify a negotiation class untethered to any specific case is an abuse of discretion – and likely one more step in the district court's push to obtain a monetary settlement to address what it deems a national crisis, although no merits decision has yet been made.

The district court asserted that the negotiation class will effectuate a familiar judicial function of "assisting parties in creating a settlement, particularly in a large case of this type with contested liability and adversarial litigation…." (Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413588.) But the district court's assertion that it is exercising judicial authority rings hollow in light of the broad class definition it employed, its refusal to predicate its certification decision on a specific complaint or set of complaints, its statement that litigants and non-litigants will be able to be included in any potential settlement, and its failure to pay

heed to the rigorous scrutiny required under the court rule before a class is certified.

Nor is the district court's desire to effectuate a settlement to address what it characterizes as a national opioid crisis a reason for upholding the certification. Federal district courts are not empowered under Article III to create new free-floating legislative-like entities to solve societal problems. (See Plaintiffs' Renewed and Amended Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, RE 1820, Page ID # 56634)("The aim of these negotiations has been to generate funds and establish programs to help abate the Opioids epidemic.") (*Id.*) Nor are federal courts empowered to create organizations to help those impacted by societal problems pursue global settlements that take advantage of a "peace premium" under the auspices of the judiciary. (*Id.* at Page ID # 56635.) The American judicial system has always been one of constitutionally limited powers, and the order certifying a negotiation class transgresses those boundaries in ways that are harmful. If allowed to stand, the decision will upset the equilibrium between the branches of government created by our constitutional system. See generally, *City of New Haven v. Purdue Pharma, L.P.*, No. X07HHDCV176086134S, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019).

As the Supreme Court and this Court have recognized, the power of the federal judiciary is limited to those disputes "traditionally thought to be capable of resolution through the judicial process." *Peoples Rights Organizations, Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998) quoting *Flast v. Cohen,* 392 U.S. 83, 97; 88 S. Ct. 1942 (1968); A*ccord National Rifle Ass'n v. Magaw,* 132 F.3d 272, 279 (6th Cir.1997). The negotiation class as certified here falls outside of this traditional limitation as is evident from the district court's repeated efforts to limit the effect of its own order, including trying to limit its preclusive effect and to bar the parties from citing it as it relates to certification decisions in any opioids-related litigation. (Order Certifying Negotiation Class and Approving Notice, RE 2591, Page ID # 413623-413524, ¶¶ 13-14.) The district court's need to include provisions preventing future like cases from being treated alike under the normal law-of-the-case and stare decisis rules underscores the problematic and non-judicial nature of its orders certifying the class.[4]

A reversal is required vacating the district court's order certifying a negotiation class.

[4] The remedy for this is to vacate the district court's order and remand for the district court to apply Rule 23 to a specific case or set of cases by making findings on the record about that case and the evidence before the court in that case. It was reversible error to simply announce the district court's conclusion based on its claimed general knowledge as MDL transferee judge.

B. Neither 28 U.S.C. § 1407 nor Federal Rule of Civil Procedure 23 authorizes a district court to certify a class for purposes of negotiation

The district court's analysis reflects a judicial overreach that is stunning in its boldness. First, cases transferred to an MDL do not lose their character as individual cases. But the district court is treating cases that have been transferred as though they comprise a single case – without reference to a specific complaint or set of complaints as the basis of its rulings. See *Gelboim, supra*; *In re Refrigerant Compressors Antitrust Litigation, supra*. 28 U.S.C. § 1407 provides that civil actions "involving one or more common questions of fact" may be "transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The statute requires that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated..." *Id*. The statute makes clear that the multidistrict litigation panel "may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f). Thus, the district court is empowered to make decisions with respect to *each* action as any district court could do under the Federal Rules of Civil Procedure. *Gelboim, supra*. That

means that the district court's certification order must comply with Rule 23 as it applies to a specific action.

Rather than starting out with the longstanding and well-accepted rule that federal courts are courts of limited powers, the district court reasoned that it has the power to create a negotiation class because "the text of Rule 23 does not dictate, nor therefore limit, the uses to which the class action mechanism can be applied." (Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413585.) This approach, which rests on the assumption that Rule 23 authorizes whatever it does not disapprove, finds no support in the language of Rule 23 or any of the Supreme Court's or this Court's decisions.

Rule 23(b)(3) provides that a class action may be certified if the "court finds that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The rule contemplates aggregate litigation when it is a superior method of "efficiently adjudicating the controversy." *Id.* That language requires consideration of the claims articulated in the complaint – yet the district court analyzed certification without reference to any specific complaint, although it relied on complaints

filed in Summit County, Ohio, for its discussion, using "as its reference the allegations in substantially similar complaints filed in Summit County, Ohio…" (Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413589.) The district court stated that "[b]ased on these pleadings, which are common across many, if not most, of the MDL litigants and putative Class Representatives, the Court will analyze the movants' request to certify for class treatment…" (*Id.* at Page ID # 413591.)

But the district court was required to provide rigorous scrutiny to determine that the requirements of Rule 23 have been satisfied. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013). The party seeking certification as a class must affirmatively demonstrate his compliance with the rule. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-351 (2011). A party must "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, 'typicality of claims or defenses, and adequacy of representation, as required' by the rule." *Behrend*, *supra*, quoting *Wal-Mart Stores*, 564 U.S. at 350 (italics in original). In *Wal-Mart*, the Court explicitly rejected an approach that merely looked to whether a complaint raises common questions, explaining that "[a]ny competently crafted class complaint literally raises common 'questions.'" *Wal-Mart Stores*, 564 U.S. at 349 quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. REV. 97,

131-132 (2009). According to the Court, a plaintiff's recitation of a series of apparently common questions on the basis of artful pleading is not enough:

> For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification.

Wal-Mart, 564 U.S. at 349-350.

The district court failed to provide rigorous scrutiny. First, in failing to tether its analysis to a specific complaint or group of complaints, the district court obviated the strictures of the rule. The district court conceded that the pleadings it used to conduct its analysis "are common across many, *if not most*" of those it included in its certified class. (Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413591)(italics added). This is entirely insufficient. If the pleadings are not common across even "most" of those included in the order certifying the class, how can the district court conclude that common questions predominate? It can't.

Second, the district court erroneously relied on its conclusion that "[t]he Court and parties are deeply steeped in the legal and factual issues in the case, and the extensive record of the case" as a "more than sufficient factual and legal context for a decision on class certification." (Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413589.) Such an assertion

flies in the face of the more specific and rigorous inquiry that the rule requires. Being steeped in the legal and factual issues may be helpful; it does not replace analysis of the record in a specific case before certifying a class. The district court's analysis of Rule 23 requirements is woefully inadequate as is discussed at length in the joint petition for permission to appeal pursuant to Federal Rule of Civil Procedure 23(f), Case 19-305, Doc 1-2, pp. 24-35 and in Brief of Appellant, Case 19-4097, Doc 44, pp. 34-54.

Third, as is apparent even in the discussion in the McGovern and Rubenstein article on which the district court relied, serious potential problems with certification exist because the local governments are seeking very different relief and have vastly different experiences of opioid abuse. The differences suggest irreconcilable conflicts between the interests of the parties, none of which were adequately addressed. The complex but incomplete voting scheme underscores those problems and reveals the impropriety of certifying this class.

C. The public pressures arising from what the district court calls a national crisis makes it even more important that decisions regarding class certification conform to the normal constraints imposed under the rule of law

Since the 1966 revision of Rule 23, with its addition of subdivision (b)(3), federal courts have experienced a vast increase in class action

litigation. Experience has shown that once a class is certified, defendants "[f]aced with even a small chance of a devastating loss" may be "pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). See also Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 812 (Dec. 2010) ("virtually all cases certified as class actions and not dismissed before trial end in settlement"). This *in terrorem* effect of the certification decision makes it one of immense importance.

And those effects are likely to be even more pronounced here. From the outset of this litigation, the district court has repeatedly expressed its desire to solve the societal problems created by opioid abuse. (Transcript of 1/12/18 Proceedings, RE 71, Page ID # 462; Memorandum Opinion Certifying Negotiation Class, RE 2590, Page ID # 413579.) The district court has denigrated the need to "figure[e] out the answer to … legal questions," because of the priority the district court places on doing "something meaningful to abate [the opioid] crisis." (Transcript of 1/12/18 Proceedings, RE 71, Page ID # 462-463.) The article on which the district court relied for a rationale for its "negotiation class" frankly explains that "[t]he purpose of the negotiation class is to generate a negotiating bloc that can leverage its breadth

to extract a meaningful lump sum settlement offer from a defendant." *McGovern, supra*, p. 19.

The public concern about opioid abuse and societal problems associated with it makes it more important to abide by normal rules governing certification. Various defendants in this litigation have been pilloried in the press although the theories on which they have been sued in this litigation have not yet been tested on the merits. At the same time, national and local news is filled with discussion about opioids, the problems associated with their misuse, and a rush to judgment by various institutions and entities in seeking to reject charitable contributions or remove names associated with opioid manufacturers from facilities and programs. Here is a sampling of recent news:

- Frank Miles, *Two-Thirds of Americans Blame Drug Companies for Opioid Crisis, New Poll Says*, Fox News (Apr. 25, 2019), https://www.foxnews.com/health/2-3-of-americans-blame-drug-companies-for-opioid-crisis-new-poll-says;

- Alana Semuels, *Are Pharmaceutical Companies to Blame for the Opioid Epidemic?*, The Atlantic (Jun. 2, 2017), https://www.theatlantic.com/business/archive/2017/06/lawsuit-pharmaceutical-companies-opioids/529020/;

- Geoff Mulvihill & Matthew Perrone, *Data Show Many Companies Contributed to US Opioid Crisis*, AP News (Jul. 17, 2019), https://www.foxnews.com/health/2-3-of-americans-blame-drug-companies-for-opioid-crisis-new-poll-says;

- Collin Binkley, *Tufts University Severs Ties with Family behind OxyContin*, The Washington Post (Dec. 5, 2019), https://www.washingtontimes.com/news/2019/dec/5/tufts-university-severs-ties-with-family-behind-ox/;

- Andy Rosen, *Warren Urges Harvard to Drop Sackler Name From Museum Over Family's Opioid Ties*, The Boston Globe (May 8, 2019), https://www.bostonglobe.com/business/2019/05/08/senator-urges-harvard-drop-name-major-donor-sackler-that-tied-opioid-maker/WbfxH2HVRu7o4WgNu3CKSL/story.html;

- Steve LeBlanc, *Parents Press Harvard to Remove Sackler Name From Art Museum*, WBUR News (Apr. 13, 2019), https://www.wbur.org/news/2019/04/13/harvard-sackler-family-art-museum*;*

- Peggy McGlone, *Sen. Merkley of Oregon Wants Smithsonian to Drop Sackler Name From Museum*, The Washington Post (Jun. 19, 2019), https://www.washingtonpost.com/entertainment/museums/sen-merkley-of-oregon-wants-smithsonian-to-drop-sackler-name-from-museum/2019/06/19/ad866870-92b1-11e9-b570-6416efdc0803_story.html;

- Elizabeth Harris, *The Met Will Turn Down Sackler Money Amid Fury Over the Opioid Crisis*, N.Y. Times (May 15, 2019), https://www.nytimes.com/2019/05/15/arts/design/met-museum-sackler-opioids.html;

- Bill Chappell, *Sackler Family's Donation to British Museum is Quashed Over Opioid Fallout*, NPR (Mar. 20, 2019), https://www.npr.org/2019/03/20/705057043/sackler-familys-donation-to-british-museum-is-quashed-over-opioid-fallout;

- Liam Stack, *Guggenheim Museum Says it Won't Accept Gifts From Sackler Family*, N.Y. Times (Mar. 22, 2019), https://www.nytimes.com/2019/03/22/arts/guggenheim-sackler-family-donations.html;

- Ellen Barry, *Tufts Removes Sackler Name Over Opioids: 'Our Students Find it Objectionable'*, N.Y. Times (Dec. 5, 2019), https://www.nytimes.com/2019/12/05/us/tufts-sackler-name-opioids.html;

- Danny Hakim, et al., *The Giants at the Heart of the Opioid Crisis*, N.Y. Times (Apr. 22, 2019), https://www.nytimes.com/2019/04/22/health/opioids-lawsuits-distributors.html;

- The Editorial Board, *An Opioid Crisis Foretold*, N.Y. Times (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/opinion/an-opioid-crisis-foretold.html; and

- Shreeya Sinha, et al., *Heroin Addiction Explained: How Opioids Hijack the Brain*, N.Y. Times (Dec. 19, 2018), https://www.nytimes.com/interactive/2018/us/addiction-heroin-opioids.html?mtrref=www.google.com&gwh=94D12E305BDB8E0FBDB97050B90AEB5A&gwt=pay&assetType=REGIWALL.

But our system of justice does not decide cases and controversies on the basis of public opinion. Nor does it permit judicial outcomes to turn on public concern about societal problems separate from the rule of law. Rather, its hallmark is that each litigant is provided due process to defend or prosecute their claims and defenses in a fair and neutral system under applicable constitutional, statutory, and rule requirements as applied by an unbiased decision maker. Scholars have noted that MDL procedures can undermine the longstanding principle that litigants have a right to their individual day in court. See 95 MARTIN H. REDISH & JULIE M. KARABA, *One Size Doesn't Fit All:*

Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism, *in* BOSTON UNIVERSITY LAW REVIEW, 112-113, 115 (2015).

Although an MDL as authorized by 28 U.S.C. § 1407 is supposed to involve only a temporary transfer of cases for pretrial purposes, and the transferred actions are supposed to retain their identity as separate suits, and the district court is supposed to exercise its jurisdiction just as any district court would with respect to any action, the reality shows that this does not always happen. "All players in an MDL, including the judge, face enormous pressures to achieve a global resolution in the transferee district." *Id.* at 47. And here, the hydraulic pressure created by public concerns about opioids coupled with the inherent MDL pressure to settle the transferred cases and a transferee judge's repeated focus on settlement ought not be allowed to justify decisions that are unconstrained by the normal and ordinary rules and processes.

The order certifying a negotiation class is inconsistent with Article III, 28 U.S.C. § 1407, and Rule 23. It should therefore be vacated.

RELIEF

Wherefore, Lawyers for Civil Justice respectfully requests this Court to vacate the district court orders certifying a negotiation class and to grant the relief sought by Defendants-Appellants.

PLUNKETT COONEY

BY: */s/ Mary Massaron*

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Dated: February 13, 2020

CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

MARY MASSARON, being first duly sworn, certifies and states the following:

1. She is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached brief on appeal;

2. The brief on appeal prepared by her office complies with the type-volume limitation;

3. Plunkett Cooney relies on the word count of their word processing system used to prepare the brief, using Cambria size 14 font; and

4. The word processing system counts the number of words in the brief as 5,127.

Dated: February 13, 2020

/s/ Mary Massaron
MARY MASSARON

CERTIFICATE OF SERVICE

MARY MASSARON, attorney with the law firm of PLUNKETT COONEY, being first duly sworn, deposes and says that on the 13th day of February, 2020, she caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the United States Court of Appeals for the Sixth Circuit, and via U.S. Mail to any counsel not registered to receive electronic copies from the court, by enclosing same in a sealed envelope with first class postage fully prepaid, addressed to the above, and depositing said envelope and its contents in a receptacle for the U.S. Mail.

PLUNKETT COONEY

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of Entry No.	**Record Entry No.**	**Page ID #**
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Plaintiffs' Renewed and Amended Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	1820	56631-56810
Memorandum Opinion Certifying Negotiation Class	2590	413578-413617
Order Certifying Negotiation Class and Approving Notice	2591	413618-413625
Order Clarifying Negotiation Class Certification	2713	419212-419215