

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LINDA ROSE, JENNIFER CRADIT,
SYLVIA DENISE BRADDOCK, LISA
RENEE BRANDIMORE, DWAYNE
BUTTERFIELD, BOBBIE WAYNE
CARTER, DANIEL WRAY CLAYTON,
JOSHUA FULLER, NICHOLAS ANTHONY
GILES, WILLIE LOUIS HENDRICKS,
TANISHA RAMON JOHNSON, ROBERT
ALLEN KELSEY, SUE ANN LETTERMAN,
LIZZIE QUARLES, Personal Representative of the
Estate of DONNA LYNN QUARLES, deceased,
GREGORY LOUIS SCHULTZ, AMANDA RAE
SHINAVER, DWAYNE ALANN SIMMONS,
ROBIN RENEE THOMAS, JOSHUA ALLEN
WEIGANT, JUSTIN ANDERSON, CRAIG
MASON, and MATTHEW STARKWEATHER,

Case Number 01-10337
Honorable David M. Lawson

Plaintiffs,

v.

SAGINAW COUNTY, SAGINAW COUNTY
SHERIFF'S DEPARTMENT, MUNICIPAL
GOVERNMENTAL ENTITIES, CHARLES BROWN,
and OFFICERS JOHN DOE, and JANE DOE,
(in their individual capacity), jointly and severally,

Defendants.

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR FOR SANCTIONS
AND SCHEDULING STATUS CONFERENCE**

This matter is before the Court on a motion filed by the defendants to dismiss or for other sanctions because of the alleged failure of the plaintiffs to attend and properly participate in settlement conferences. The plaintiffs responded in opposition to the motion, and the Court heard arguments on the motion in open court on June 30, 2006. Based on the information presented, the Court believes that all parties are participating and will continue to participate in settlement

discussions in good faith. No sanctions are appropriate at this time, and certainly dismissal is not called for.

On January 18, 2006, the Court ordered the parties to participate in a settlement conference with Judge Patrick Duggan of this court to take place on February 6, 2006. The Court directed the parties “to appear in person with the clients or decision makers with full settlement authority.”

The next day, the Court scheduled a facilitative mediation session to take place by March 15, 2006 if the settlement conference did not resolve the matter. The parties agreed to amend the facilitation order, and on March 14, 2006 the Court entered an order appointing former Wayne County, Michigan circuit judge Pamela Harwood as a facilitator to conduct a mediation session before March 31, 2006. The Court order provided that “[a]ll parties or individuals with settlement authority are required to attend the facilitative mediation sessions. All parties are directed to attend all scheduled mediation session(s) with their respective counsel of record. Corporate parties must be represented by an agent with authority to negotiate a binding settlement.” Docket # 221.

The defendants state the plaintiffs failed to appear at settlement conferences on February 6, 2006 before Judge Duggan and April 24, 2006 with Judge Harwood. Only the plaintiffs’ attorneys appeared, in direct violation of this Court’s orders. The defendants believe further attempts at settlement would be meaningless unless the plaintiffs attend. The defendants argue that the plaintiffs have “repeatedly failed to participate in the prosecution of the case and have defied discovery and pretrial orders.” The defendants ask for dismissal and/or sanctions. The defendants’ motion does not state that concurrence was sought, as required by E.D. Mich. LR 7.1(a).

The plaintiffs attorneys admit no plaintiffs were present at the February 6, 2006 conference, but prior to that session Mr. Pianto made contact with all but two *Rose* plaintiffs and obtained

settlement authority. At the settlement conference, no objection was made to the plaintiffs' absence by Judge Duggan, who was conducting the mediation, or by defense counsel. The plaintiffs believe they substantially complied with the Court's order, which required that "[a]ll parties or individuals with settlement authority are required to attend."

The parties subsequently began discussing a global settlement of all four of the related cases – *Rose, Brabant v. Saginaw County*, *Abner v. Saginaw County*, and *Whittum v. Saginaw County* – in which there are approximately 94 plaintiffs. On March 16, 2006, a telephone conference was conducted with the parties and Judge Harwood. The plaintiffs state it was agreed that the plaintiffs themselves did not need to attend conferences involving discussion of a global settlement. Plaintiffs' counsel explains that none of the plaintiffs appeared at the April mediation session for that reason. At the conference, defendants were upset that the plaintiffs were not present, but the plaintiffs' attorneys apparently were surprised given the previously recited agreement. The plaintiffs' attorneys offered to produce the plaintiffs the following day, but the defendants rejected the offer. The plaintiffs state that global settlement discussions have continued with Judge Harwood. They have stalled, however, because the parties have been waiting for this Court's decision on the summary judgment motions filed in *Abner* and *Brabant*.

The settlement conferences ordered by the Court are pretrial conferences governed by Federal Rule of Civil Procedure 16. That rule includes the following provision:

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).

Fed. R. Civ. Pro. 16(f). Rule 37(b)(2) allows the court to impose a variety of sanctions for disobeying a court order, including dismissal and contempt. However, courts should not impose the ultimate penalty absent clear abuse of its orders by counsel amounting to contempt. *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997) (holding that “absent a clear record of delay or contumacious conduct, an abuse of discretion occurs if the district court dismisses an action with prejudice”) (citing *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980)). The propriety of a dismissal as a sanction under Rule 37 generally is assessed in light of four factors identified by the Sixth Circuit in *Regional Refuse Sys. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988), which were succinctly summarized by the court in *United States v. Reyes*, 307 F.3d 451 (6th Cir. 2002), as follows: “(1) whether the party’s failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party’s conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.” *Id.* at 458.

In this case, none of the four factors favors dismissal. The plaintiffs’ counsel attempted to comply with the first order, which directed the parties “to appear in person with the clients or decision makers with full settlement authority.” Docket # 228. Mr. Pianto had settlement authority from 20 of the 22 *Rose* plaintiffs. Although the Court’s preference in the second order for personal appearances by the parties themselves is clear, the order does allow “[a]ll parties or individuals with settlement authority” to attend. More importantly, if global settlement talks were underway, requiring all the plaintiffs to attend is impractical until the discussions begin to focus on the individual claims, if they ever do.

Finally, the defendants cannot demonstrate that the plaintiffs' actions were wilful or in bad faith, and the defendants were not prejudiced. The defendants have not stated that they were ready to settle this case but were unable because the plaintiffs were not present. The plaintiffs were not on notice that their actions could result in dismissal.

There is no basis to dismiss the action, and lesser sanctions are not called for here either.

Accordingly, it is **ORDERED** that the defendants' motion to dismiss of for sanctions [dkt #228] is **DENIED**.

It is further **ORDERED** that counsel shall appear for a status conference at the Court's chambers on **August 31, 2007 at 3:00 p.m.** to discuss further case management.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: July 19, 2007

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on July 19, 2007.

s/Felicia M. Moses
FELICIA M. MOSES