

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

In re FLINT WATER CASES

*Anderson, et al.,*

*Plaintiffs*

v.

*City of Flint, Michigan, et al.,*

*Defendants.*

Civil Action No. 5:16-cv-  
10444-JEL-MKM

Hon. Judith E. Levy

Mag. Mona K. Majzoub

Class Action

**SUPPLEMENTAL BRIEF OF DR. LAWRENCE A. REYNOLDS, MD,  
FAAP, IN SUPPORT OF OBJECTIONS TO FINAL APPROVAL OF  
CLASSWIDE SETTLEMENT**

Objector and Class Member, Dr. Lawrence A. Reynolds, MD, FAAP, (“Dr. Reynolds”), through the undersigned *pro bono* counsel, hereby submits this Supplemental Brief in support of his prior written objections to the final approval of the Amended Master Settlement Agreement (“MSA”), (ECF Nos. 1436, 1840), as well as his objections stated on the record at the Fairness Hearing which began on July 12, 2021. On July 15, 2021, the final day of the Fairness Hearing, the Court invited supplemental briefing on issues related to fairness, reasonableness, and

adequacy of the proposed settlement.<sup>1</sup> Accordingly, Dr. Reynolds hereby respectfully submits this Supplemental Brief to assist the Court in fully evaluating the fairness, reasonableness, and adequacy of the proposed class settlement.<sup>2</sup>

Specifically, Dr. Reynolds objects to the use of bone scan lead testing with portable X-Ray Fluorescence (XRF) devices on living humans as part of the settlement. Dr. Reynolds submits that the Court cannot fully evaluate the fairness, reasonableness, or adequacy of the proposed settlement without more fully assessing the safety and efficacy of the use of the XRF devices on living humans, especially children, and making an affirmative finding on the same.

While legal authority certainly exists, particularly in other circuits, standing for the proposition that the Court cannot “rewrite” the settlement agreement, that is far from the totality of the relevant analysis this Court should consider. As set forth in one of the leading treatises on complex litigation, including class actions, “[t]he

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<sup>1</sup> See, e.g., <https://www.mlive.com/news/flint/2021/07/no-immediate-ruling-on-202m-attorney-fees-request-in-flint-water-crisis-settlement.html> (last visited July 18, 2021) (“The judge has said she expects to study transcripts and court documents as well as inviting additional briefs to be filed before making a written decision about whether the settlement and attorney fees are fair, reasonable, and adequate”).

<sup>2</sup> Given the Court’s invitation for supplemental briefing following the fairness hearing, Dr. Reynolds has not submitted a formal motion on this issue. Dr. Reynolds notes that a formal motion at this late stage of the proceedings might unnecessarily prolong the process. Nevertheless, if the Court prefers that a formal motion be submitted, Dr. Reynolds’ *pro bono* counsel will meet and confer with all affected parties pursuant to the Local Rules and this Court’s orders and thereafter submit a formal motion.

trial court may not rewrite a settlement agreement; if it is unacceptable the court must disapprove it; ***but it may suggest changes.***” *Manual for Complex Litigation*, Fourth Ed. (2004), § 13.14, at p. 173 (emphasis added); *see also Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) (discussing process of reviewing proposed settlement and noting that the reviewing judge can either grant approval, deny approval, or suggest changes to the parties for modification of the proposed settlement); *In re Auction Houses Antitrust Litig.*, No. 00 Civ. 0648, 2001 WL 170792, at \*18 (S.D.N.Y. Feb. 22, 2001) (conditioning approval of a settlement on the parties adopting changes specified by the district court); *Romstadt v. Apple Computer, Inc.*, 948 F. Supp. 701, 707 (N.D. Ohio 1996) (noting that a “proposed agreement is more readily alterable” and that “[t]he choice facing the court and parties is not limited to the binary alternatives of approval or rejection”); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 146 (S.D. Ohio 1992) (approving revised settlement). Further, the Court is well within its authority to place conditions on its approval of class settlements. *See Manual for Complex Litigation*, Fourth Ed. (2004), § 21.61, at p. 309 (“The judicial role in reviewing a proposed settlement is critical, but limited to approving the proposed settlement, disapproving it, ***or imposing conditions on it.***” (emphasis added)). That is precisely what Dr. Reynolds, as an Objector and Class Member, proposes that the Court do here, *i.e.*, urge the parties to strike

provisions in the MSA that include or otherwise promote the use of portable XRF bone scans given safety and efficacy concerns.

As it has now become abundantly clear since Dr. Reynolds first filed his objections on February 26, 2021 to the use of portable XRF bone scans (ECF No. 1436), serious questions have been raised about the propriety, safety, efficacy, and methodology connected to Dr. Aaron Specht, PhD's ("Dr. Specht") use of the subject devices in Flint. For example, health experts, including Dr. Mona Hanna-Attisha, MD—the pediatrician who first sounded alarm bells about elevated lead levels in numerous children in Flint—have strongly denounced the use of portable XRF bone scans in connection with the settlement.<sup>3</sup> Even Thermo Scientific Portable Analytical Instruments Inc. ("Thermo Fisher")—the manufacturer of the subject devices—warns against using the devices on living humans under the circumstances presented here and refuses to sell or lease the machines to anyone it suspects would use it on living humans when not done subject to approval by a university Institutional Review Board ("IRB").<sup>4</sup> There has been no such approval

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<sup>3</sup> See, e.g., <https://www.mlive.com/news/flint/2021/07/bone-scan-debate-dominates-first-day-of-fairness-hearing-for-flint-water-crisis-settlement.html> (last visited July 18, 2021) ("Critics, including Flint pediatrician Dr. Mona Hanna-Attisha, have questioned the use of the portable bone scanning equipment because the device used in Flint was not designed for human testing, because of the potential unknown harm it may cause, and because of doubts that the tests will capture historic exposure suffered by Flint children.").

<sup>4</sup> See May 12, 2021 Letter from Thermo Fisher to Napoli Shkolnik & Assocs., PLLC (ECF No. 1840-2); see also

or IRB here. Against this backdrop, the interests of justice compel this Court to withhold its approval of the settlement so long as XRF bone scans are part of it.

As evidenced by the filing and then expeditious withdrawal of Co-Lead Class Counsel Michael Pitt's Motion for an Immediate Suspension of the use of Portable XRF Bone Scanning Tests Pending a Further Hearing (ECF Nos. 1443, 1444), previously-filed good faith objections by Dr. Reynolds, and disputed material facts about the efficacy and safety of the device for the purposes for which Dr. Specht is using it and proposes through the settlement to continue to use it, the Court needs additional information before granting final approval (or disapproval) of the settlement. To that end, the Court possesses the inherent authority to (1) appoint a neutral expert pursuant to Federal Rule of Evidence 706, and/or (2) hold an evidentiary hearing specifically on the efficacy and safety of the XRF device at issue in the MSA, to further assist the Court in more fully assessing safety concerns with use of the XRF device on humans under the circumstances presented here. In the interest of justice and to protect the interests of Class Members, the people of Flint, and the classwide settlement process, Dr. Reynolds, on behalf of himself and affected Class Members, urges the Court to do so. Appointing a neutral expert,

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<https://www.freep.com/story/news/local/michigan/flint-water-crisis/2021/06/03/flint-lead-thermo-fisher-bone-scan/7523747002/> (last visited July 19, 2021) (“The manufacturer of a handheld lead scanner wrote to a Flint law firm in May and told the lawyers to stop using the device on Flint residents because the company has not certified that it is safe to do so.”).

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