

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EBRAHIM SHANEHCHIAN,	:	NO. 1:07-CV-00828
Individually and on behalf of :	:	
all others similarly situated, :	:	
	:	
Plaintiff,	:	
	:	
v.	:	OPINION AND ORDER
	:	
MACY'S, INC. et al.,	:	
	:	
Defendants.	:	

A hearing on class certification was scheduled in this matter for October 20, 2010, at 10:00 A.M. On October 7, 2010, the Court received a letter from Plaintiffs asking for clarification on the scope of the hearing. Specifically, Plaintiffs appeared concerned that Defendants intended to treat the hearing as an evidentiary hearing and planned to present live testimony of their expert witness to the Court. The Court clarified to the parties that the hearing is a hearing on the propriety of class certification and will not be transformed into a full-fledged evidentiary hearing. Defendants then submitted a letter to the Court in which they asked for "reconsideration of the Court's ruling...precluding the use of witnesses at the October 20 hearing." In the letter, Defendants argue that a full evidentiary hearing is necessary in order to determine the propriety of certification. The Court issues this Order to address the issues presented by the letters submitted by the parties.

By way of background, on August 30, 2005, Defendant Macy's completed a merger with The May Department Stores, acquiring nearly 500 May stores (doc. 27). According to the complaint, after the acquisition, Macy's "made a series of material representations and omissions regarding [Macy's] declining sales growth and its failures in converting the newly acquired May stores into Macy's brand stores...which caused Macy's common stock to trade at artificially inflated levels" (Id.). Plaintiffs filed this class action, asserting claims under Section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132 (Id.). Plaintiffs claim that Defendants were fiduciaries of certain ERISA plans and that they breached their fiduciary duties under ERISA by allowing the plans to invest in Macy's stock and by encouraging plan participants to invest in Macy's stock (Id.). Plaintiffs allege that as a result of Defendants' ERISA violations, Plaintiffs and members of the proposed class suffered substantial losses of retirement savings and anticipated retirement income (Id.).

Plaintiffs filed a Motion to Certify Class on October 13, 2009 (doc. 65). Defendants responded in opposition (doc. 76) and provided the Court with voluminous exhibits in support of their opposition (docs. 75, 77), and Plaintiffs replied (doc. 86). In addition, Plaintiffs filed a motion to strike the report of Defendants' expert (doc. 84), to which Defendants responded (doc. 94), again with supporting exhibits (doc. 95). Plaintiffs filed a

reply (doc. 100), and Defendants filed a sur-reply (doc. 103). This matter was then stayed pending mediation, which was unsuccessful.

To assist the Court in its decision-making with respect to the Motion to Certify Class, the Court scheduled a hearing on the motion, which hearing has been scheduled and rescheduled many times. The latest hearing date of October 20 was vacated to allow the Court an opportunity to address the issues raised by the letters submitted by both sides.

As an initial matter, the Court directs the parties to Local Rule 7.2(c), which reads, "Letters to the Court are generally inappropriate and disfavored, unless (1) requested by the Court in a specific matter, or (2) advising the Court of the settlement of a pending matter. All other written communications shall be by way of formal motion or memorandum submitted in compliance with these Rules." The Court expects that all further communication from the parties in this matter will comport with this rule.

Defendants have stated that "both parties contemplated a full evidentiary hearing" and have implied that the Court similarly contemplated the same, merely because the Court docketed a "hearing" as opposed to "oral arguments." What the parties contemplated or did not contemplate is irrelevant to the Court's position here: the hearing on class certification will not be transformed into a "full evidentiary hearing" as Defendants demand,

and the Court's use of the word "hearing" should not be read to have ever implied otherwise. The Court schedules "hearings" on class certification in order to hear from the attorneys in the case, to entertain legal arguments about the propriety of class certification. Plaintiffs are correct: the Court has never ordered and certainly never insisted that witness testimony be provided at the scheduled hearing. To be clear, the Court will not entertain such testimony at this stage in the proceedings. However, since the use of the word "hearing" has apparently created confusion for Defendants, the Court will endeavor to refer to "oral arguments" on the propriety of class certification.

Obviously, the burden of proof is on Plaintiffs to support each element required by Federal Rule of Civil Procedure 23. However, this does not, as Defendants contend, mean that a Rule 23 hearing must be transformed into a full-fledged evidentiary hearing with live testimony, and the authorities cited by Defendants do not hold otherwise. Indeed, as Plaintiffs note, none of the three cases cited by Defendants involved a decision on the propriety of class certification following an evidentiary hearing. See, e.g., Taylor v. Keycorp, 2010 WL 3702423 (N.D. Ohio Aug. 12, 2010)(case dismissed on a 12(b)(1) motion). Defendants read Taylor to "dictate" that they be allowed to present live testimony to the Court on the issue of class certification. First, surely Defendants understand that district courts do not "dictate" to one

another, and this Court is not bound by Taylor. Second, Defendants' reading of Taylor is inordinately sweeping. In fact, Taylor in no way speaks to the issue of live testimony. Taylor was decided on a Rule 12(b)(1) motion to dismiss and did not appear to involve any type of hearing, let alone an evidentiary one. Taylor certainly can be read to be supportive of Defendants' expert here, who appears to have been the expert used by the defendants in Taylor. However, that is quite a separate issue from requiring that Defendants' expert be allowed to testify at this stage.

Similarly, Defendants cite In re American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996) for their position that an evidentiary hearing must occur. However, this again misreads the case. It is true, as Defendants assert, that American Medical notes that "ordinarily the determination [on class certification] should be predicated on more information than the pleadings will provide [,and t]he parties should be afforded an opportunity to present evidence on the maintainability of the class action." 75 F.3d at 1079. However, Defendants leap from that statement to their position that they must be given a full evidentiary hearing. That leap is wholly unjustified. What American Medical stands for is the proposition that judges must base their decisions regarding class certification on facts, not on conclusory statements made in the pleadings. It in no way stands for the proposition that an evidentiary hearing must be held.

Indeed, Defendants overlook one critical fact here: they have been given an opportunity to present their evidence, and they have taken advantage of that opportunity, as have Plaintiffs. This fact alone distinguishes American Medical, where the Sixth Circuit found that the plaintiffs had simply recited the elements of Rule 23 in conclusory terms, both in their complaint and in their class certification motion, "without submitting any persuasive evidence to show that [those] factors [were] met." 75 F.3d at 1083 (reversing decision to certify class, which was made without "discovery, briefing or argument" after a conditional certification). The Court is able to "probe behind the pleadings," American Medical, 75 F3d at 1079, by reviewing the evidence already presented to the Court in the form of the exhibits and affidavits and other filings and by engaging with counsel in arguments about such evidence at the oral arguments scheduled in this matter. The cases cited by Defendants support the proposition that decisions regarding class certification must be made on evidence, and the Court finds wholly unpersuasive Defendants' use of these cases to support their position that live testimony must be presented to the Court.

Simply put, contrary to Defendants' implications, the Court is fully capable of determining the propriety of class certification, including the resolution of any conflicting expert opinions, on the basis of lawyer arguments and the evidence already

presented to the Court via the parties' filings. At the oral arguments, Plaintiffs can point the Court to testimony and other evidence they have adduced in support of each element of Rule 23, and Defendants can respond, without burdening the Court and the parties with live testimony at this stage in the proceedings.

To the extent the parties are trying to go to the merits of the litigation by insisting on live testimony regarding class certification, the Court would like to make clear that the Court believes that a decision on the merits should be made after the decision on class certification. Clearly, this is proper because, assuming Plaintiffs meet their burden with respect to class and a class is certified, a decision on the merits would then be binding on the putative class, so that, for example, if summary judgment for Defendants is appropriate on some issues, Defendants would be protected from further litigation on those issues, and, similarly, if summary judgment is not granted on any or all issues after certification, then trial on the merits will determine what issues will be binding on the class.

Of course, the Court recognizes that whether to certify a class "generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'". Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978). However, the parties are hereby forewarned that the oral arguments scheduled in this matter are not an opportunity to argue the merits

of the action, except to the limited extent necessary for the Court's determination of the propriety of class certification.

The Court SETS this matter for oral arguments on the propriety of class certification for November 23, 2010, at 3:00 P.M., after which the Court will issue its decision on Plaintiffs' Motion to Certify Class. A decision on Plaintiffs' Motion to Strike will be issued before the date set for oral arguments.

SO ORDERED.

Dated: October 21, 2010

s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge

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