IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLAKE J. ROBBINS, et. al., Plaintiffs, -and- **COLLEEN AND KENNETH WORTLEY, FRANCES AND DAVID MCCOMB, AND CHRISTOPHER AND LORENA CHAMBERS** Plaintiff-Intervenors, v. **LOWER MERION SCHOOL DISTRICT,** et al., Defendants.	CIVIL ACTION NO. 2:10-CV-00665JD

Response of Wortley Intervenors in Opposition to Plaintiffs' Motion for Class Certification, and Joinder with Defendants' Cross-Motion for Permanent Equitable Relief

Pursuant to the Court's Order dated July 13, 2010, the Wortley Intervenors file this memorandum in opposition to plaintiffs' motion for class certification. In order not to burden the Court and parties, the Wortley Intervenors will not repeat any of the arguments defendants (collectively, "LMSD") made in their Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification and In Support of Defendants' Cross-Motion for Entry of Permanent Equitable Relief. The Wortley Intervenors agree with and join every such argument, and join LMSD's cross-motion for entry of permanent equitable relief. The Order of May 14, 2010 and a grant of the cross-motion render class certification entirely unnecessary and inappropriate.

We write only to amplify LMSD's argument that plaintiffs fail to satisfy the adequacy of representation requirement, Fed. R. Civ. P. 23(a)(4). Because plaintiffs' litigation tactics and strategy fundamentally conflict with the interests of the putative class, plaintiffs can not satisfy the adequacy of representation requirement.

In particular, the putative class is harmed, not benefitted, by plaintiffs' counsel's tactic of publishing unsubstantiated and inflammatory accusations against LMSD. Within one business day after LMSD filed its opposition brief, plaintiffs' counsel gave yet another interview to the Philadelphia Inquirer, ascribing the following improper motives to and making inflammatory accusations against LMSD: (1) "[LMSD's motion] was a ploy to deter other students from suing for being photographed by their laptop webcams"; and (2) "[Defendants are] trying to make it more difficult for those they have injured to recover." Philadelphia Inquirer article dated July 19, 2010, copy attached hereto as Exhibit A.

Plaintiffs' Counsel has no basis whatsoever for making such accusations. Further, neither statement makes any sense, especially in the context of a motion to certify an injunctive relief only class. Opposing certification of an injunctive relief class can not possibly serve to deter anyone from bringing a damages action against the school district. To the contrary, anyone interested in suing LMSD for damages is and will be free to bring such an action regardless of whether the court certifies a Rule 23(b)(2) class. Because no damages claims are being released, the Court's ultimate ruling on plaintiffs' motion to certify an injunctive relief class will make it no more or less difficult for anyone to sue to recover damages from LMSD.

Although plaintiffs' counsel is undoubtedly a zealous advocate for the Robbins family, his besmirching the character of LMSD by attributing to it improper and unsubstantiated motives squarely conflicts with the putative class's interests in (a) expeditiously putting an end to this litigation, and (b) doing so in a way that does not further tarnish the reputation of the school district. LMSD's (and the Wortley Intervenors') opposition to class certification is not a "ploy" to deter *future* litigation but a well-reasoned effort to fairly, efficiently, and expeditiously resolve *this* litigation.

By continuing to litigate their case in the press, and by continuing to make false and inflammatory accusations against LMSD, plaintiffs and their counsel show that they have interests that are antagonistic to those of the class they seek to represent. Nearly 500 parents of between 500-600 Lower Merion high school students have signed a petition opposing class certification. They simply do not want to be represented by plaintiffs or their counsel in their pursuit of a litigation strategy that protracts rather than resolves the litigation, and that harms rather than benefits the putative class.[1] Such a strategy is antagonistic to the interests of all Lower Merion high school students and their families; indeed, of all Lower Merion residents.

Because of these fundamental conflicts of interest, and for the reasons set forth in LMSD's brief, plaintiffs are unable to satisfy the adequacy of representation requirement. Accordingly, and for all the reasons set forth in LMSD's brief, plaintiffs' motion for class certification should be denied.

CONCLUSION

For the foregoing reasons and the reasons contained in LMSD's brief and cross-motion, the Wortley Intervenors respectfully request that the Court deny plaintiffs' motion for class certification and grant LMSD's cross-motion for entry of an Order granting permanent equitable relief.

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[1] The Wortley Intervenors are understandably concerned for another reason. In an earlier case, plaintiffs' counsel was found by both the Third Circuit Court of Appeals and another court in this district to have breached his fiduciary duties and to have acted in bad faith as an attorney and trustee, for which he was required to pay the plaintiffs' attorneys' fees. *Dardovitch v. Haltzman*, 190 F.3d 125, 143-147 (3d. Cir. 1999) (Becker, J.); *see also id.* at 136 (appeals court finding Haltzman to have "litigated excessively" in what the district court referred to as "long, acrimonious litigation").

DATED: July 23, 2010

Respectfully submitted,

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EXHIBIT A

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Posted on Mon, Jul. 19, 2010

Lower Merion school board to consider webcam policy

By John P. Martin

Inquirer Staff Writer

The laptops are locked away for the summer, new school policies drafted, court orders signed, and public apologies extended.

But students and parents in the Lower Merion School District who hoped to begin the next school year with the webcam-monitoring furor behind them might think again.

The lawsuit that first exposed the district's practice of secretly activating webcams on student laptops shows no signs of ending, with lawyers last week trading barbs over who was delaying the case and why.

The U.S. Attorney's Office will not discuss its probe into the matter. And two Lower Merion employees suspended with pay since February have not been told whether or when they will get their jobs back.

Meanwhile, the school district's legal tab for the case - which last month was nearing $1 million and climbing - remains the subject of a separate dispute with its insurer.

After working with a consultant in recent months to review and revise its technology policies, the school board is expected to consider new policies Monday, including letters about the laptop program that will go to all students and parents. And a committee of 60 administrators, teachers, parents, and students has been meeting to examine the webcam issue and recommend more changes.

"Our goal is to be a national model when it comes to the intersection of technology, privacy, and security," said spokesman Doug Young.

But still looming is the lawsuit by a Harriton High School student that brought global attention to Lower Merion and stirred debate.

On Friday, attorneys for the school district asked a judge to deny a bid by the student, Blake Robbins, and his attorney to certify the lawsuit as a class-action matter.

In a motion to U.S. District Judge Jan E. DuBois, the district's attorneys said that Robbins was not representative of a larger class and that steps taken by Lower Merion - and an injunction signed by the judge - should prevent the practice from happening again.

"Certification would in fact be just the first of several potentially burdensome and expensive steps," said the motion, signed by four Ballard Spahr L.L.P. attorneys.

Robbins' attorney, Mark S. Haltzman, said the school district's motion reneged on an earlier agreement not to fight class certification. He said it was a ploy to deter other students from suing for being photographed by their laptop webcams.

"They're trying to make it more difficult for those they have injured to recover," Haltzman said.

Though narrow in a legal sense, the outcome of the squabble could have a broader effect.

Without class-action status, the case could ultimately be cast as an overblown fight between Lower Merion and a single family - one that happened to have a history of debts and litigation - instead of a transgression against 2,300 students and families in one of the state's elite public school districts.

Haltzman contends that class certification guarantees a more thorough and lasting protection for Lower Merion students. He also said it would not affect how much money he, the Robbinses, or anyone else might get in a settlement; he has said he will not seek damages for the class.

"I'm not in any better position or worse position because it's a class action," he said.

Attorneys for the school district say Robbins cannot represent a class because no other student has made claims like his. They noted that parents of more than 500 Lower Merion students signed a petition last winter asking not to be included in any suit - and that some of those parents plan to file their own opposition to class certification.

"No other students [were] treated in the same or even a remotely similar manner as the proposed class representative, Mr. Robbins," the motion states.

In his lawsuit, Robbins alleged that the district invaded his privacy by snapping webcam shots of him in his Penn Valley house.

The district has not filed a formal response in court, but a report by its internal investigators said that staffers activated Robbins' webcam because he took a loaner computer from school without permission or having paid a required insurance fee.

An assistant principal later confronted Robbins with a webcam photo she thought showed him with a handful of illegal pills in his bedroom. Robbins said it was candy.

In the last six weeks, dozens of other students have been notified that they were secretly photographed by their webcams and invited to privately review the photos. A second federal judge is overseeing that process.

The district's internal investigation concluded that laptop webcams had been activated 76

times in less than two years, but that none of the photos captured was salacious. Investigators also said there was no evidence that employees used the technology to spy on students.

Most of the computers had been reported lost or stolen. But the district acknowledged that more than half of the 58,000 photos and screenshots occurred because district technicians did not or forgot to turn off webcams and tracking software on laptops that were recovered.

Haltzman contends that the LANrev software - which programmed webcams to snap a picture every 15 seconds the laptop was running - photographed more students than the district has identified or acknowledged.

The district's lead attorney, Henry E. Hockeimer Jr., declined to comment Friday, except to point to the report that said computer experts hired by the district had retrieved all the photos.

Meanwhile, the only Lower Merion employees who could activate the monitoring system remain out of work. Information systems coordinator Carol Cafiero and technician Michael Perbix were placed on administrative leave in February but continue to draw their salaries - nearly $200,000 combined annually.

Cafiero's attorney, Charles Mandracchia, said she was losing hope that the district would pay her legal bills or reinstate her.

Those fees and salaries represent a fraction of the overall cost to the district thus far. Through May, the Ballard Spahr law firm and L-3 Communications had billed Lower Merion more than $780,000 for their work on the case.

Young, the district spokesman, said he expected more bills soon. The Robbinses' attorney also plans to ask the court to make the school district pay his fees - which by early June were $148,000.

Still unresolved is who will pay those bills or any potential settlements. The school district and its insurance company, Graphic Arts Mutual Insurance Co. Inc., have filed competing claims in federal court over who should pay. Each accuses the other of breaching its contract.

A judge has scheduled a conference on the matter for Aug. 25. Two weeks later, students report for the new school year.

Contact staff writer John P. Martin at 610-313-8120 or jmartin@phillynews.com.

☐ Check the box to include the list of links referenced in the article.

CERTIFICATE OF SERVICE

I hereby certify that, on July 23, 2010, I caused a true and correct copy of the foregoing Response of Wortley Intervenors in Opposition to Plaintiffs' Motion for Class Certification and Joinder With Defendants' Cross-Motion for Permanent Equitable Relief to be served upon the below-listed counsel by ECF, and such document is available for viewing and downloading from the ECF System:

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Dated July 23, 2010

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