UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: USA GYMNASTICS, Debtor.	Chapter 11 Case No. 18-09108-RLM-11

RESPONSE OF TIG INSURANCE COMPANY TO JOINT MOTION REQUESTING THE COURT TO CONDUCT A SETTLEMENT CONFERENCE

TIG Insurance Company, an insurer and party in interest in this Chapter 11 case, hereby submits this response to the Joint Motion Requesting the Court to Conduct a Settlement Conference and For Other Relief [D.I. 1230] (the "Joint Motion") filed by the Debtor and the Additional Tort Claimants Committee of Sexual Abuse Survivors (the "Movants"). In response to the Joint Motion, TIG respectfully states as follows:

1. Movants premise their motion on grounds found somewhere in the fog between rank speculation and baseless accusation. Any suggestion that TIG did not comply with the Court's June 19, 2020 Order (both with respect to submission of a confidential meaningful settlement offer prior to the mediation and direct participation at the mediation on August 11 and 12, 2020 by representatives with ultimate settlement authority) is not based on the true facts. Movants cite – and can cite - no facts that support such a suggestion. There is no basis for so accusing TIG, let alone grounds for ordering TIG's CEO to participate directly in a court-ordered settlement conference.

2. TIG did not act in "bad faith" at the recent mediation or otherwise seek to delay the case for its own economic benefit. TIG complied with the June 19 Order, delivering a timely and meaningful settlement offer to the mediators 10 days before the mediation -- as ordered. At the mediation, five TIG company representatives (and three outside attorneys) sat in Zoom rooms for two days, duly authorized to negotiate a settlement to resolve the claims. There was no impediment to TIG's authority at mediation and, indeed, no concern was raised during those two days regarding the lack of CEO participation.

3. TIG objects to the Movants' characterizations and requests that the Court strike the unfounded statements in the Joint Motion that the insurers did not comply with the Court's June 19 Order to make meaningful settlement offers and acted in bad faith (Paragraph 5) and that they did not participate in mediation in good faith (Paragraph 9).

4. TIG further objects to Movants' request that this Court require company executives to attend any further settlement or mediation sessions. The June 19 Order did not require CEOs to attend, and the Debtor's selection of party representation to include its own CEO is not controlling. The presence of insurance company CEOs at mediation or settlement conferences is not typical or expected for cases even of the highest magnitude. Indeed, the Court of Appeals for the Sixth Circuit recently granted a petition for mandamus reversing a district court's decision to require a CEO to participate in a settlement conference in a RICO case involving General Motors. See Ex. A, In re: General Motors, LLC, et al., 20-1616 (6th Cir. July 6, 2020) (Doc. 13-2) (concluding that district judge "failed to provide legally adequate reasons" to support the decision to order CEOs to personally attend settlement conference).

5. Even the case law and rules cited by Movants acknowledge that the "selection of the appropriate representative should ordinarily be left to party and its counsel." See ARAC Roof

It Forward v. Nationwide Mut. Ins. Co. of Am., No. 17-cv-4468, 2019 U.S. Dist. LEXIS 94077 (S.D. Ind. June 5, 2019) (affirming magistrate judge's requirement that insurance company CEO attend a settlement conference under factually distinguishable circumstances from those at issue with respect to TIG here); FED. R. CIV. P. 16(C), Advisory Committee Note (1993). Nothing extraordinary has occurred to alter the general practice. TIG has repeatedly sent multiple senior company representatives with authority to resolve these claims to each round of mediation. There is no basis for this Court to stray from the general preference for the parties to select their own representatives for mediation and settlement conferences.

6. Successful settlement negotiations require all parties' meaningful participation, and the Joint Motion noticeably omits any discussion of the Movants' own obligations and conduct. The June 19 Order likewise required the Committee to make a meaningful demand. Without divulging mediation details in breach of mediation privilege, it is clear that the parties continue to have a fundamental disagreement regarding the appropriate range for resolution of these claims.

7. This Court appointed Judge Zive, later joined by Paul Van Osselaer, to preside over the mediation process in connection with the bankruptcy proceeding (subsequent to several rounds of mediation with other mediators pre-petition). These mediators have been engaged for over a year meeting with the interested parties on numerous occasions, without success. While TIG has concerns that another settlement conference may not result in a different outcome from the most recent mediation efforts, it defers to this Court to determine whether another settlement attempt would be beneficial.[1] If a settlement conference is scheduled, TIG will participate in good faith, as it has throughout the past two years of settlement efforts.

[1] Movants note in the Joint Motion that this Court is uniquely positioned to conduct a settlement conference because it will never be called upon the try to Survivors' claims (which ultimately will be referred back to the District Court). [D.I. 1230 at Para. 9.] By the same token, TIG notes that this Court's oversight of a settlement conference involving

Respectfully submitted,

Dated: August 24, 2020

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Debtors' insurers, and the evaluation of issues pertaining to their respective coverage obligations, may be problematic with respect to this Court presiding over the adjudication of coverage disputes in this action.

EXHIBIT A

No. 20-1616

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 06, 2020
DEBORAH S. HUNT, Clerk

In re: GENERAL MOTORS, LLC; GENERAL MOTORS COMPANY,

Petitioners.

O R D E R

Before: SUHRHEINRICH, GILMAN, and LARSEN, Circuit Judges.

Plaintiffs, General Motors, LLC and General Motors Company ("GM"), sued defendants, FCA US LLC, Fiat Chrysler Automobiles N.V., and three individuals ("FCA"), for conspiring to violate the Racketeer Influenced and Corrupt Organizations Act and various state laws. On June 23, 2020, the district judge entered the order that led to this mandamus petition. The order required CEOs Mary Barra of GM and Michael Manley of FCA (the "CEOs") to meet in person, without their legal counsel, "to reach a sensible resolution of this huge legal distraction," and to personally report back to the district judge on July 1, 2020, via a public Zoom webinar, on their progress in settling the case. We stayed the order pending receipt of FCA's answer. The district judge has provided a response. GM has filed a reply.

"Any power a lower federal court exercises must have some basis in either an act of Congress or the Constitution. Otherwise, it has no basis in law." *In re Univ. of Mich.*, 936 F.3d 460, 465 (6th Cir. 2019). The Federal Rules of Civil Procedure provide district judges with tools to manage their busy dockets. *See id.* Relevant here, at any pretrial conference, the district judge may consider and take appropriate action on settling the case. Fed. R. Civ. P. 16(c)(2)(I). To

facilitate open communication, "settlement conferences should be private, not open to the media and the public." *In re Univ. of Mich.*, 936 F.3d at 464.

The district court has since modified the June 23, 2020 order. Counsel may now be present during the CEOs' face-to-face meeting and at the pretrial conference, which will be closed to the public. Mandamus relief is inappropriate if the district court corrects its own errors. *In re Life Inv'rs Ins. Co. of Am.*, 589 F.3d 319, 325 (6th Cir. 2009). One issue, however, remains. Did the district judge abuse his discretion when he dictated who specifically had to attend on behalf of the parties and required that they meet face-to-face?

"If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement." Fed. R. Civ. P. 16(c)(1). "Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances." Fed. R. Civ. P. 16 Advisory Committee Notes (1993 Amendments). "The selection of the appropriate representative should ordinarily be left to the party and its counsel." *Id.* The district judge did not consider or try the lesser alternative of permitting the parties and their counsel to select their own corporate representatives and allowing them to confer with one another by any reasonable means, including by telephone or video conference. Furthermore, the reasons offered by the district judge for issuing the June 23 order—for example, the COVID-19 pandemic and the tragic killing of George Floyd—are not related to settling the issues specific to this case. The district judge accordingly failed to provide legally adequate reasons to establish that it was appropriate to order the CEOs personally to meet face-to-face to consider a possible settlement. *See* Fed. R. Civ. P. 16(c)(1); *see also In re Univ. of Mich.*, 936 F.3d at 464 (concluding that the district court's desire to have the University president "explain University policy to his constituents" was "not a valid reason" to order the

president to attend a settlement conference in person). We conclude that despite its subsequent modification, the June 23 order is not in harmony with the provisions of Rule 16. *See In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993).

We have authority to issue a writ of mandamus under 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21. "However, a writ of mandamus is an extraordinary remedy that we will not issue absent a compelling justification." *In re Life Inv'rs Ins. Co. of Am.*, 589 F.3d at 323. "Only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). Three conditions must be satisfied. First, GM must have no other adequate means to attain the relief it desires. Second, GM must show that its right to the issuance of the writ is clear and indisputable. Third, we must find that the writ is appropriate under the circumstances. *Id.* at 380–81; *see John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008). We conclude that these conditions are satisfied.

The relief that GM seeks cannot be obtained by other adequate means such as direct appeal because, once the in-person meeting occurs, the issue will be moot. The need for mandamus relief is also clear. An abuse of discretion occurs when "the district court's decision is clearly unreasonable, arbitrary or fanciful." *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 525 (6th Cir. 2005). Without any prior input from the parties or their counsel, the district judge: (1) singled out the parties' highest ranking officers; (2) required that they meet face-to-face; (3) did not account for the risks involved in traveling during the COVID-19 crisis; (4) ordered them to report back to the court in only eight days; and (5) took these measures for reasons unrelated to the case. We

conclude that issuance of the writ is warranted. We do not mean to say, however, that the district judge may not order a pretrial settlement conference and/or mediation in the normal course.

Lastly, we consider GM's request that its case be reassigned to a different district judge. "This Court possesses the power, under appropriate circumstances, to order the reassignment of a case on remand pursuant to 28 U.S.C. § 2106." *Rorrer v. City of Stow*, 743 F.3d 1025, 1049 (6th Cir. 2014). "Reassignment 'is an extraordinary power and should be rarely invoked.'" *U.S. ex rel. Williams v. Renal Care Grp.*, 696 F.3d 518, 533 (6th Cir. 2012) (quoting *Solomon v. U.S.*, 467 F.3d 928, 935 (6th Cir. 2006)). The district judge's desire for a quick settlement is not so extreme as to call for such a remedy. Contrary to GM's claim, neither the comments nor the conduct of the district judge "establishes that he would not be able to decide fairly this factually complicated case upon remand." *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 239 (6th Cir. 2003). We therefore decline to exercise our power of reassignment here. *See Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 702 (6th Cir. 2018).

The petition for a writ of mandamus is **GRANTED** to the extent that the district judge ordered that a settlement conference be held face-to-face and dictated who specifically had to attend on behalf of the parties. The request for reassignment is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk