

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

**SYLVESTER MCCLAIN, on his own  
behalf and on behalf of a class of similarly  
situated persons, et al.,**

*Plaintiffs,*

vs.

**LUFKIN INDUSTRIES,**

*Defendant.*

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**CIVIL ACTION NO. 9:97-CV-063**

**JUDGE COBB**

**DEFENDANT LUFKIN INDUSTRIES' MOTION TO  
DISMISS CLASS REPRESENTATIVES**

Defendant Lufkin Industries ("Lufkin") moves to dismiss class representatives Patrick Ross, Mary Thomas (Williams), Eddie Mask, Leroy Garner, Sherry Calloway Swint, Walter Butler, Clarence Owens, Earl Potts, Clifford Duirden, and Roald Mark ("class representatives") for failure to fairly and adequately protect the interests of the class.

**BACKGROUND**

On March 31, 1999, the Court entered an order designating Patrick Ross, Mary Thomas (Williams), Eddie Mask, Leroy Garner, Sherry Calloway Swint, Walter Butler (as a "John Doe"), Clarence Owens (as a "John Doe"), Earl Potts, Clifford Duirden, and Roald Mark as additional class representatives. Since that time, these class representatives have failed to demonstrate any interest in the action and have failed to adequately protect the interests of the absent class members.

**ARGUMENT AND AUTHORITY**

Federal Rule of Civil Procedure 23(a)(4) provides, "One or more members of a class may sue . . . as representative parties on behalf of all only if . . . (4) the representative parties will

fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). In its class certification memorandum opinion, the Court indicated that it “has continuing authority and ongoing obligation to adjust the class to serve the interest of its class members.” *McClain v. Lufkin Industries, Inc.*, 187 F.R.D. 267, 281 (E.D. Tex. 1999). Indeed, the district court is charged with an ongoing duty of monitoring its class decisions in light of the development of the case. *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983). *See also Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457, 462 (5th Cir. 1978) (“Before defining a class suit, the district court must determine that ‘the representative parties will fairly and adequately protect the interest of the class.’ The court’s responsibilities do not end there; it must continue carefully to scrutinize the adequacy of representation . . .”) (citation omitted); *Guerine v. J&W Inv., Inc.*, 544 F.2d 863, 864 (5th Cir. 1977) (“A decision as to class certification is not immutable. Rule 23(c)(1) empowers and requires a court to carefully scrutinize the adequacy of representation in all class actions.”).

The adequacy requirement mandates that the class representatives demonstrate the willingness and ability to take an active role in and control the litigation. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482 (5th Cir. 2001). *See also Gill v. Monroe County Dept. of Social Services*, 92 F.R.D. 14, 16 (W.D.N.Y. 1981) (“The class representative stands in a most important position with regard to the litigation. Since the absent class members will be bound by any judgment which results from the action, the class representative has a special duty to safeguard the interests of the absent members and must be able and willing to participate actively in the litigation.”); *City Partnership Co. v. Jones Intercable, Inc.*, 213 F.R.D. 576, 584 (D. Colo. 2002) (“Whether or not the class representative is familiar with the specifics of the complaint is not dispositive of the more critical question of whether that individual will adequately represent

the claims of the class by devoting time and effort to the lawsuit.”) (quoting *In re Southeast Hotel Properties Limited Partnership Investor Litigation*, 151 F.R.D. 597, 607 (W.D.N.C. 1993)). The class is entitled to more than blind reliance upon even competent counsel by uninterested representatives because an attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987); *Greenspan v. Brassler*, 78 F.R.D. 130, 133 (S.D.N.Y. 1978) (both quoting *In re Goldchip Funding Co.*, 61 F.R.D. 592, 594 (M.D.Pa. 1974)).

Since being added as named representatives in this class action, the class representatives have failed to adequately represent and protect the interests of the absentee class members. The class representatives have shown no interest in this action and, since the class certification hearing, have not attended a hearing or trial.<sup>1</sup> Courts have held that a plaintiff who fails to attend hearings and trial is inadequate to serve as a class representative. *In re Goldchip Funding Co.*, 61 F.R.D. at 595 (denying class certification due to lack of adequate representation because the plaintiffs failed to demonstrate a “keen interest in the outcome of the litigation” as evidenced by the fact that neither of the proposed class representatives had attended any of the three hearings held in the case); *Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 398 (D.N.J. 1998) (holding that an individual who may not be able to attend trial is not an adequate class representative because absence from trial seriously interferes with the obligation to vigorously prosecute the action). *See also Gill*, 92 F.R.D. at 16 (noting that the class representative was removed due to her apparent lack of interest in the lawsuit); *Lenora v. Koller Die & Tool Co., Inc.* 1978 WL 200, \*1 (E.D. Wis. 1978) (disqualifying the plaintiff as an adequate class representative because of his demonstrated disinterest in the lawsuit). This Court has also

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<sup>1</sup> Nor did any of these representatives attend any of the mediation sessions.

emphasized the importance of class representatives attending hearings in the present case. *McClain*, 187 F.R.D. at 281 (indicating that the adequacy of representation requirement was satisfied because “Mr. McClain and Mr. Thomas have attended each court appearance involving this suit.”).

Accordingly, by not attending hearings and trial, the class representatives have failed to fairly and adequately protect the interests of the class and should be dismissed.

**CONCLUSION**

For the foregoing reasons, Lufkin moves this Court to dismiss Patrick Ross, Mary Thomas (Williams), Eddie Mask, Leroy Garner, Sherry Calloway Swint, Walter Butler, Clarence Owens, Earl Potts, Clifford Duirden, and Roald Mark as class representatives.

Respectfully submitted,

/s/

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DOUGLAS E. HAMEL

Attorney-In-Charge

State Bar No. 08818300

dhamel@velaw.com

CHRISTOPHER V. BACON

Of Counsel

State Bar No. 01493980

MICHELLE MAHONY

Of Counsel

State Bar No. 24002516

2300 First City Tower

1001 Fannin Street

Houston, Texas 77002-6760

(713) 758-2036 (Telephone)

(713) 615-5388 (Telecopy)

OF COUNSEL:

VINSON & ELKINS, L.L.P.

First City Tower

Houston, Texas 77002-6760

CERTIFICATE OF SERVICE

I certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2004, a copy of the foregoing Defendant Lufkin Industries' Motion to Dismiss Class Representatives was filed electronically through the Court's CM/ECF system and was automatically copied to Plaintiffs through the court's electronic filing system.

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/s/  
Attorney for Defendant

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**JUDGE COBB**

**ORDER GRANTING DEFENDANT LUFKIN INDUSTRIES’  
MOTION TO DISMISS CLASS REPRESENTATIVES**

The Court, having considered Defendant’s Motion to Dismiss Class Representatives Patrick Ross, Mary Thomas (Williams), Eddie Mask, Leroy Garner, Sherry Calloway Swint, Walter Butler, Clarence Owens, Earl Potts, Clifford Duirden, and Roald Mark, ORDERS that said class representatives be dismissed.

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UNITED STATES DISTRICT JUDGE