

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

PHYLLIS BALL, <i>et al.</i>	:	
	:	
Plaintiffs	:	Case No. 2:16-cv-00282
v.	:	
	:	Chief Judge
JOHN KASICH, <i>et al.</i>	:	Edmund A. Sargus, Jr.
	:	
Defendants,	:	Magistrate Judge
	:	Elizabeth Preston Deavers
and	:	
	:	
GUARDIANS OF HENRY	:	
LAHRMAN, <i>et al.</i>; OHIO	:	
ASSOCIATION OF COUNTY	:	
BOARDS,	:	
	:	
Intervenor Defendants.	:	

**EXPEDITED MOTION OF AMICUS CURIE
OHIO PROVIDER RESOURCE ASSOCIATION
TO PARTICIPATE IN SETTLEMENT NEGOTIATIONS**

Amicus Curie Ohio Provider Resource Association (“OPRA”) respectfully moves this Court on an *expedited basis* for an Order allowing OPRA to participate in the Court-ordered settlement negotiations and conference as a friend of the Court who has “a great interest in the outcome” of this litigation and “an interest that should be considered by the parties, if not the Court itself.” (See ECF No. 309, pp. 2-3.)

I. Factual Background

On May 2, 2018, the parties and OPRA attended a status conference in the Court’s chambers. During the status conference, an agreement was reached that the parties would engage in settlement negotiations and mediation during May and June 2018. (See ECF No. 309,

p. 2.) At the time, OPRA requested to participate in the settlement negotiations and mediation, and *no party objected to OPRA's request*. The only party to raise any concerns was Plaintiff Disability Rights Ohio, and its concerns were limited to maintaining the confidentiality of the settlement negotiations. OPRA agreed that any and all settlement discussions would remain confidential.

Following the May 2, 2018 status conference, the Court issued an Order addressing a number of outstanding issues, including setting the parameters for the parties' settlement discussions, and addressing OPRA's Motion to Intervene. (ECF No. 309, at pp. 2-3.) With regard to OPRA's Motion to Intervene, the Court "concluded" that although "OPRA does not possess a legally cognizable interest in this action, [it] has a great interest in the outcome." (*Id.*) The Court went on to state that "[i]t is clear that OPRA has an interest [that] should be considered by the parties, if not the Court itself" and that "[b]ecause [O]PRA has an important interest and a valuable perspective on the issues presented, the Court shall permit [O]PRA to participate in the role of amicus curie." (*Id.*)

Based on the Court's Order and the parties' representations at the status conference, counsel for OPRA sent a letter to counsel for the parties on May 10, 2018 confirming OPRA's participation in the settlement negotiations and confirming that any and all information disclosed during the negotiations would remain confidential. OPRA agreed to be bound by the confidentiality provisions in the Stipulated Protective Order entered in this case and by the Federal Rules of Evidence as applied to settlement negotiations. A copy of OPRA's May 10, 2018 letter is attached hereto as Exhibit A.

On May 14, 2018, OPRA was surprised to receive a response to its letter refusing OPRA's participation in settlement negotiations. The letter was signed by counsel for each

party. The parties' response refusing OPRA's participation in settlement discussions is attached hereto as Exhibit B.

In their response, the parties state that "it is not clear whether there will be a potential for agreement among the existing parties in interest" and that "[a]s a result, [the parties] think it is pre-mature to include OPRA, or any other system stakeholders." Counsel for the parties went on to state that only "[i]f the parties' meetings in June are fruitful, and [they] determine that substantive negotiations will continue" would the parties "revisit when and how to solicit feedback from OPRA." (*See* Ex. B.)

II. Law and Argument

Pursuant to Local Rule 16.3, the Court "in its discretion and at such times during the process of the case as appear appropriate, . . . may assign any civil case . . . for one or more mediation or settlement week conferences." Loc. R. 16.3(a)(1). "Any Judge presiding in a civil case may, in that case, enter such orders as are lawful, just and appropriate to administer fairly an ADR program suitably tailored to it." Loc. R. 16.3(e)(2). Further, as the Court has recognized already in this case, "[c]lassical participation . . . as a friend of the court was, and continues to be, a privilege within the sound discretion of the courts . . . depending upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice.'" *Ball v. Kasich*, 2017 U.S. Dist. LEXIS 116145, *24, 2017 WL 3172778 (internal citations omitted).

Here, the Court should exercise its discretion and enter an order permitting OPRA to participate in the May and June 2018 settlement discussions as an amicus curie.

First, the Court has already expressly recognized OPRA's interest in the outcome of this litigation. (*See* ECF No. 309.) This necessarily includes OPRA's interest in the outcome of

settlement negotiations.

Second, it is entirely unclear why the parties have taken the position that OPRA should not be included in the settlement negotiations and conference. Plaintiffs were the only party to file an opposition to OPRA's Motion to Intervene. (*See* ECF No. 298.) Surely, if the Defendants had no objection to OPRA's participation as a party in this case, they have no credible objection to OPRA's participation in settlement discussions as an amicus curie. Further, even though Plaintiffs filed an opposition to OPRA's Motion to Intervene, Plaintiffs went out of their way to direct this Court to OPRA's extensive involvement and key role in programmatic and policy issues at both the legislative and administrative levels. Plaintiffs also argued that OPRA has opportunities other than formal intervention to weigh in on the policy decisions that affect the system and their members, and thus it need not be a party in this case to do so. (*Id.* at pp. 14-15.) Participation in this case as an amicus curie is one such opportunity. Yet, Plaintiffs are now taking the position that OPRA need not be involved and, indeed, that it should be shut out of the very programmatic and policy decisions that it and its members have helped shape and decide for over forty years.

Third, and along those same lines, the role that the parties are attempting to relegate OPRA to is inconsistent with the Court's May 2, 2018 Order. The parties state in their letter that "if the parties' meetings in June are fruitful," and if the parties "determine that substantive negotiations will continue," only then will the parties "revisit when and how to solicit feedback from OPRA." (*See* Ex. B.) By taking this position, the parties have not-so-subtly taken away any ability of OPRA to meaningfully participate as amicus curie as the Court ordered. Without being present at the settlement discussions, OPRA will not be able to provide necessary, meaningful and helpful information as a key stakeholder. OPRA cannot practically participate as

a “friend of the court” if it is shut out of the discussions for which it is supposed to provide feedback and advice.

III. Conclusion

Given (1) that OPRA is a major stakeholder in the State system that Plaintiffs challenge (which Plaintiffs themselves have acknowledged), (2) that it has a wealth of information and insight that could further possible settlement of this case, and (3) the Court’s Order expressly recognizing OPRA’s interest in the outcome of the case, it is unclear why the parties are attempting to refuse OPRA’s participation in settlement negotiations.

If taken at their word, the parties believe these settlement discussions are over before they begin, and that is why they think it is “pre-mature to include OPRA.” OPRA does not have the same dim view of settlement. The Court’s Order on the scope of the class has clearly refined the issues and the affected consumers, and all interested parties – OPRA included – support community living and integration for all Ohioans with disabilities. Thus, there would seem to be – contrary to the parties’ letter – genuine momentum toward and opportunity for a resolution. Accordingly, OPRA respectfully requests that the Court, in its discretion, permit OPRA to participate in the court-ordered settlement negotiations and conference as an amicus curie, so that it can meaningful engage with the parties on a global solution that takes into account OPRA’s “great interest in the outcome” of this case and its important and continuing role in serving the needs of disabled Ohio citizens.

Respectfully submitted,

/s/ Peter A. Lusenhop
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Suzanne J. Scrutton (0043855)
Kara M. Mundy (0091146)

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*Counsel for Amicus Curie
Ohio Provider Resource Association*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed electronically on May 18, 2018. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the Electronic Filing Receipt. The parties may access this filing through the Court's system.

/s/ Peter A. Lusenhop _____
Peter A. Lusenhop (0069941)



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May 10, 2018

VIA E-MAIL

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Re: *Ball, et. al. v. Kasich, et. al.*
Southern District of Ohio Case No. 2:16-cv-282

Dear Counsel:

Further to our discussions at last week's status conference, and the Court's May 2, 2018 Order recognizing that OPRA "has a great interest in the outcome" of this case, OPRA wishes to participate in the settlement discussions and mediation efforts scheduled in this matter. It is our understanding that Defendants and Intervening-Guardians do not object to our participation. With respect to Plaintiffs, the only concern that was raised related to the persons at OPRA who would be receiving information about the settlement discussions, and instructions to those persons that the settlement discussions are confidential and are not to be disclosed.

VORYS

Legal Counsel

May 10, 2018

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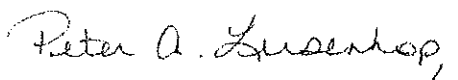
To that end, OPRA agrees that it will only share information regarding the parties' settlement positions with a "Litigation Subgroup." This subgroup of OPRA's membership will be comprised of the following members of OPRA's larger Board and the OPRA President and Vice President:

Name	Company/ Organization	Title
Mark Davis	Ohio Provider Resource Association	President
Anita Allen	Ohio Provider Resource Association	Vice President
Diane Beaström	Koinonia Homes, Inc.	CEO
Jamie Steele	Ohio Valley Residential Services, Inc.	Executive Director
Michael Malone	Josina Lott Residential & Community Services	Executive Director
Robert Heinzerling NHA	Heinzerling Foundation	Executive Director
Roy Cherry	The Epilepsy Center of Northwest Ohio	Executive Director
Than Johnson	Champaign Residential Services, Inc.	Chief Executive Officer
Thomas Weaver	Choices In Community Living	Executive Director

The Litigation Subgroup, and OPRA, further agree to be bound by the confidentiality provisions set forth in the Stipulated Protective Order entered by the Court in this case and by applicable Rules of Evidence.

Please let us know if you have any questions or concerns.

Very truly yours,


Peter A. Lusenhop

PAL/kmm

cc: Suzanne J. Scrutton
Kara M. Mundy

VIA E MAIL

May 14, 2018

Peter A. Lusenhop
Vorys, Sater, Seymour and Pease LLP
palusenhop@vorys.com

Re: *Bell, et al. v. Kasich, et al.*, No. 2:16-cv-282 (S.D. Ohio) (CJ Sargus)

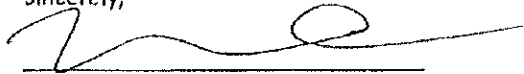
Dear Mr. Lusenhop:

We – the parties – are in receipt of your letter dated May 10, 2018, that references the Court's recent Order that denied your client's intervention (but allowed it to participate in the role of *amicus curie*, similar to how the ARC and VOR have participated on substantive briefing).

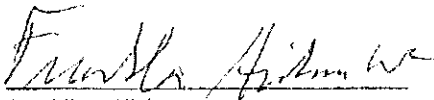
It has been almost a year since the parties met to discuss the framework for a comprehensive settlement in this case. At this stage in the process, it is not clear whether there will be a potential for agreement among the existing parties in interest. As a result, we think it is pre-mature to include OPRA, or any other system stakeholders, in these discussions.

If the parties' meetings in June are fruitful, and we determine that substantive negotiations will continue, we can revisit when and how to solicit feedback from OPRA. That being said, if there are specific concerns or priorities you'd like to share prior to our June 11, 2018 parties' meeting, we are happy to consider them.

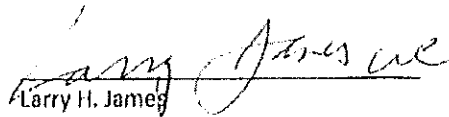
Sincerely,



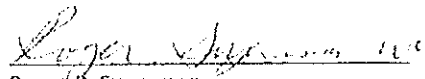
Kerstin Sjoberg-Witt
For Plaintiffs



Franklin J. Hickman
For Intervenor County Boards



Larry H. James
For Defendants



Roger P. Sugarman
For Intervenor Guardians