

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

Elnora Carthan, *et al.*,

Plaintiffs,

-v-

Rick Snyder, *et al.*,

Defendants.

Case No.: 5:16-cv-10444-JEL-EAS

Hon. Judith E. Levy  
Magistrate Judge Elizabeth A. Stafford

**CLASS PLAINTIFFS' MOTION FOR APPROVAL OF THE FORM AND  
MANNER OF CLASS NOTICE**

Pursuant to Fed. R. Civ. P. 23(c), and for the reasons set forth in the accompanying brief, Class Plaintiffs<sup>1</sup> respectfully move the Court to approve the form and manner of class notice proposed by Class Plaintiffs in the accompanying memorandum, Declaration of Eric Schachter, and proposed Notices attached as Exhibits B & C to the Declaration.<sup>2</sup>

Dated: December 1, 2021

Respectfully submitted,

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<sup>1</sup> The certified Class Representatives are Rhonda Kelso, on behalf of herself and her minor child, K.E.K., as well as Barbara and Darrell Davis. Second Am. Op. & Order Granting in Part & Denying in Part Class Pls.’ Mot. to Certify Class at 145, ECF No. 1957, PageID.68153.

<sup>2</sup> Pursuant to Eastern District of Michigan Local Rule 7.1, Class Plaintiffs sought concurrence from the Veolia and LAN Defendants regarding the relief requested in this motion, but did not obtain concurrence.

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**MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR  
APPROVAL OF THE FORM AND MANNER OF CLASS NOTICE**

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**CONCISE STATEMENT OF THE ISSUE PRESENTED**

1. Should the Court approve the manner and form of notice to the certified issues classes, as described herein?

Class Plaintiffs' Answer: Yes.

### **CONTROLLING OR MOST APPROPRIATE AUTHORITY**

- Federal Rule of Civil Procedure 23
- *In re Behr Dayton Thermal Prods., LLC*, No. 08-cv-00326 (S.D. Ohio April 29, 2021)
- *Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008)

The Court has certified two issues classes in this action pursuant to Federal Rule of Civil Procedure 23(c)(4). Second Am. Op. & Order Granting in Part & Denying in Part Class Pls.’ Mot. to Certify Class at 48-49, ECF No. 1957, PageID.68056-68057 (“Class Certification Order”). The certified issues classes (the “Issues Classes” or the “Class”) are the Multi-Defendant Issues Class, which consists of:

All persons and entities who, for any period of time between February 10, 2015 and October 16, 2015, were exposed to or purchased drinking water supplied by the City of Flint, owned real property in the City of Flint, or owned or operated a business in the City of Flint;

and the LAN Issues Class, which consists of:

All persons and entities who, for any period of time between April 25, 2014 and October 16, 2015, were exposed to or purchased drinking water supplied by the City of Flint, owned real property in the City of Flint, or owned or operated a business in the City of Flint.

*Id.*<sup>1</sup> Class Plaintiffs now seek approval of the form and manner of notice to the Issues Classes so that Class Counsel may apprise Class members<sup>2</sup> of issue certification and of their rights with respect to participation.

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<sup>1</sup> “‘Exposure’ is defined to include ingestion (either through drinking or consuming foods prepared with the drinking water), bodily contact with the water (such as by way of bathing), and property contact with the water (through residential plumbing or other appliances). . . . ‘Persons’ is defined to include only those individuals who have reached the age of majority as of the date of the class notice.” Class Certification Order at 49, ECF No.1957, PageID.68057.

<sup>2</sup> Any person or entity included in either or both of the Issues Classes is referred to herein as a “Class member.”

Class Plaintiffs’ proposed form and manner of notice dissemination is supported by an experienced notice and claims administrator, A.B. Data, Ltd. (“A.B. Data”), which Class Counsel selected after a competitive bidding process. As set forth in more detail in the supporting Declaration of Eric Schachter,<sup>3</sup> a Vice President with A.B. Data, and its attached Exhibits, courts have appointed A.B. Data as notice, claims, and/or settlement administrator in hundreds of high-volume class actions, directing it to administer some of the largest and most complex class action notice programs and settlements in the country. Class Counsel has worked with Mr. Schachter and his team at A.B. Data to develop the proposed Class Notice as well as the proposed manner of dissemination to the Class, and Mr. Schachter’s declaration in support of the proposed Notice Plan attests to its adequacy and constitutionality. Though not necessarily required to do so, the proposed form of notice provides all of the information required by Rule 23(c)(2)(B) to the Class, in language that is plain and easy to understand. Copies of the proposed forms for the mailed long-form Notice and summary Notice accompany the Declaration of Mr. Schachter as Exhibits B and C, respectively.

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<sup>3</sup> Ex. 1, Decl. of Eric Schachter in Supp. of Mot. for Approval of the Form & Manner of Class Notice ¶¶ 1-2 (“Schachter Decl.”).

The Class Notice and the manner of dissemination proposed here meet the requirements of Fed. R. Civ. P. 23 and of constitutional due process and the Court should approve them.

## **I. LEGAL STANDARD**

Federal Rule of Civil Procedure 23(c)(2) sets forth the notice requirements for certified classes. That Rule provides that where a court certifies a class pursuant to Rule 23(b)(1) or 23(b)(2), “the court *may* direct appropriate notice to the class,” Fed. R. Civ. P. 23(c)(2)(A); and where it certifies a class pursuant to Rule 23(b)(3) “the court *must* direct to class members the best notice that is practicable under the circumstances,” Fed. R. Civ. P. 23(c)(2)(B) (all emphases added). Neither the text of the Rule nor the corresponding Committee Notes describe notice requirements for an issues class certified under Rule 23(c)(4). However, Rule 23 authorizes the Court to direct notice to Class members apprising them of “any step in the action” in order “to protect class members and fairly conduct the action.” Fed. R. Civ. P. 23(d)(1)(B).

Despite Rule 23’s silence on notice to Rule 23(c)(4) class members, several courts have directed notice to members of a certified issues class. *See, e.g.*, Order Approving Proposed Class Notice, *In re Behr Dayton Thermal Prods., LLC*, No. 08-cv-00326 (S.D. Ohio April 29, 2021), ECF No. 332 (approving and directing class notice to putative Rule 23(c)(4) class); *see also Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 227, 244 (S.D.N.Y. 2010) (directing notice for a “(b)(3)/(c)(4)”

class despite the fact that “at this stage” the court had limited certification to “resolving common liability issues” under Rule 23(c)(4)). This approach comports with the spirit of Rule 23: “The purpose of notice in a class action is to afford members of the class due-process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment.” *In re Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2016 WL 9280050, at \*3 (E.D. Mich. Nov. 28, 2016) (quotation marks and citation omitted). Concern regarding the ability to opt-out may be lessened in the context on a Rule 23(c)(4) issues class insofar as any judgment will be confined to specific issues rather than an entire claim; but because members of a Rule 23(c)(4) class will be bound by the court’s ruling as to the certified issues, both Rule 23 and due process support notifying class members of the action and their ability to seek exclusion.

## **II. ARGUMENT**

### **A. Class Plaintiffs’ proposed Class Notice apprises Class members of the nature of this class action and the scope of their rights.**

Federal Rule of Civil Procedure 23(c)(2) requires that a court must direct notice to members of a Rule 23(b)(3) class that “clearly and concisely state[s] in plain, easily understood language” the following:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the

court will exclude from the class any member who requests exclusion; (v) the time and manner for requesting exclusion; and (vi) the binding effect of a class judgment on members under Rule 23(c)(3).

Adequate notice affords potential class members the ability to “make an informed decision about their participation” in the case. Manual for Complex Litigation (Fourth) § 21.311 (2004). Class Plaintiffs’ proposed Notice, though directed to members of a class certified under Rule 23(c)(4), achieves this end.

Class Plaintiffs’ proposed long-form Class Notice meets each of Rule 23’s requirements. The proposed Notice contains all of the information called for by Rule 23(c)(2)(B) and necessary to allow Class members to make informed decisions about participating in this litigation, describing Class Plaintiffs’ claims in clear and simple language. *See* Schachter Decl., Ex. B, Long-Form Notice at 1; Schachter Decl., Ex. C, Summary Notice. The proposed Class Notice states the Class definition, basic information about the case, the option for any Class member to opt-out and the procedure to do so, a statement that the judgment will be binding on Class members who do not opt-out, and the right of any member who does not opt-out to appear in the case through his or her own lawyer. Schachter Decl., Ex. B, Long-Form Notice at 1-2, 4-5; Schachter Decl., Ex. C, Summary Notice. Additionally, should a Class member desire additional information about the action, the proposed Class Notice clearly designates and provides contact information for the Administrator and Class

Counsel. Schachter Decl., Ex. B, Long-Form Notice at 5; Schachter Decl., Ex. C, Summary Notice.

The form of the proposed Class Notice satisfies the requirements of due process and, to the extent applicable, equally satisfies the specific requirements of Fed. R. Civ. P. 23(c)(2)(B).

**B. The proposed manner of notice dissemination is reasonable and appropriate under the circumstances.**

Federal Rule of Civil Procedure 23(c)(2)(B) states that, “For any class certified under Rule 23(b)(3) . . . the court must direct to class members the best notice that is practicable under the circumstances.” Despite the Court’s certification of a class under Rule 23(c)(4) rather than Rule 23(b)(3), Class Counsel have worked closely with A.B. Data to design a Notice Plan that will disseminate notice in the best practicable manner under the circumstances to reach as many Class members as reasonably possible in the interest of apprising them of this action and their rights.

Even in the context of a certified Rule 23(b)(3) class, the “best notice practicable” standard does not require actual notice, nor does it require direct notice when class members’ mailing addresses cannot readily be determined or where it is otherwise impracticable. *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008); Manual for Complex Litigation (Fourth) § 21.311 (2004). Rather, the specifics of the notice process “are left to the discretion of the court subject only to the broad



‘reasonableness’ standards imposed by due process.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975).

As described in the supporting Declaration of Eric Schachter, A.B. Data and Class Counsel have designed a Notice Plan consisting of direct mail notice to Flint Water account holders, supplemented by digital and print media targeting the Class. Schachter Decl. ¶ 13. Specifically, notice will be provided via a directly mailed long-form Notice, a summary Notice published in local print media, targeted digital banner and newsfeed ads, and through a case-specific website established by A.B. Data.

Class Counsel will provide A.B. Data with a list of known mailing addresses for Class members so that long-form Notices can be sent directly to the Class. *Id.* ¶ 6. To ensure as many Class members received mailed notice as reasonably possible, A.B. Data will check the list of addresses provided by Class Counsel against United States Postal Service records to standardize and update addresses pursuant to any recorded changes to those addresses. *Id.* ¶ 7. A.B. Data will further search for forwarding addresses for any mailed Notice that USPS returns as undeliverable and will forward to any new address that it can locate. *Id.* ¶ 8.

To supplement the mailed Notices, A.B. Data will publish a summary Notice in the local news publications *The Flint Journal* and *The Flint Courier News*. *Id.* ¶ 9. It will additionally run digital banners and newsfeed ads executed through the

Google Display Networks and YouTube. *Id.* ¶ 10. Utilizing the known contact information and demographics of the Class, the digital ads will be specifically targeted to likely Class members in and around Flint, Michigan. *Id.*

Finally, to assist potential Class members in understanding the information concerning the lawsuit and their rights, A.B. Data will establish a case-specific website. The website will provide, among other things, a summary of the case, relevant filings and Court orders, any pertinent updates concerning the litigation, and functionality for Class members to submit their contact information to receive future updates by mail and/or email. *Id.* ¶ 11.

The Court previously approved, and Class Plaintiffs successfully implemented, a notice program related to this matter to inform Settlement Class members of the Settlement reached with other of the Defendants in this action. *See Op. & Order Granting Pls.’ Mot. for Preliminary Approval of Class Settlement Components at 54, ECF No. 1399, PageID.54451 (approving proposed Settlement Class Notice); Op. & Order Granting Final Approval of Partial Settlement at 78-81, ECF No. 2008, PageID.69614-69617 (finding implementation of Settlement Class Notice satisfied Rule 23 and due process).* That Settlement Class Notice program used a similar strategy of direct mailing supported by publication in local print media and targeted digital banner ads, and it succeeded in delivering direct mailed notice to 91.4% of the identified Settlement Class, with the supplemental media notice

bringing the reach of the notice effort to in excess of 95%. Decl. of Cameron R. Azari, Esq. on Implementation & Adequacy of Settlement Notice Plan ¶ 51, ECF No. 1794-3, PageID.64351. The 2010 Federal Judicial Center’s Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide considers a 70–95% reach among class members to be reasonable. *Id.* The Notice Plan Class Plaintiffs propose here is designed to easily meet that standard.

### III. CONCLUSION

Class Plaintiffs respectfully request that the Court approve Class Plaintiffs’ proposed form and manner of class notice, as set forth in the Declaration of Eric Schachter and its attached Exhibits B & C.

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## CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above case were served via the ECF filing system on December 1, 2021.

Dated: December 1, 2021

/s/ Jessica B. Weiner

Jessica B. Weiner

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