UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re FLINT WATER CASES

Civil Action No. 5:16-cv-10444-JEL-MKM (consolidated)

Hon. Judith E. Levy
Mag. Mona K. Majzoub

CLASS PLAINTIFFS' NOTICE REGARDING DEADLINE FOR PROPOSAL OF REVISED CLASS DEFINITIONS

In an effort to avoid potentially unnecessary supplemental briefing regarding the Class Definition, Class Plaintiffs sought to confer with Veolia, LAN, and the other Answering Defendants[1] to understand whether they believed the Class as defined in the operative complaint should be struck as overly broad and, if so, their basis for that position.

Despite their obligation to meet and confer regarding potential disputes, Defendants refused to provide any basis and instead insisted that the Parties identify a deadline for amending the class definition. But the reason the parties

[1] "Answering Defendants" or "Defendants" as used in this motion refers to the Veolia Defendants, the City of Flint Defendants and the LAN Defendants.

were asked to confer about such a deadline in the first place was in response to a motion to strike the class as an impermissible "fail safe" class. That motion, however, applied to *previously pleaded* classes but did not apply to newly-pled proposed classes[2] in the operative complaint. Defendants maintain that their arguments also apply to these newly-pled class definitions, but would not articulate the basis for this position in the meet and confer process. It would be needlessly inefficient to set a deadline to amend the class definition and *then* engage in another round of motion to strike briefing – litigants are *required* to meet and confer to see if concerns can be addressed without the Court's intervention to avoid exactly this type of unnecessary briefing.

Plaintiffs can, and often do, alter the class as defined in their motion for class certification to reflect issues that arise in discovery. If Defendants believe that there is a fundamental problem with the class as defined in the operative complaint that requires amendment prior to the deadline for Plaintiffs to file the motion for class certification, they should confer with Plaintiffs about their basis for that position. If not, then there is no need to set a deadline for amending the class definition at this time.

[2] *See*, Class Plaintiffs Fourth Amended Complaint, Dkt. 620, ¶¶452-5.

BACKGROUND

At the in-chambers discussion prior to the May 15, 2019 status conference, a discussion occurred regarding Defendants' pending Motion to Strike the Proposed Classes. (Dkt. No. 275) As part of that discussion, Interim Class Counsel represented to the Court that they had engaged in work to create a process for revising the class definitions and expected that new definitions would be forthcoming.[3] As a result of this communication, Defendants offered to withdraw their pending Motion and the Court instructed the parties to meet and confer on a proposed schedule for submission of an agreed timeline for submission of revised class definitions. This notice is submitted to update the Court on the status of the meet and confer process and sets forth Interim Class Counsel's position regarding the establishment of deadlines to revise the class definitions.

[3] Class Counsel believe there may have been a miscommunication during the in chambers discussion at the last status conference; to the extent Class Counsel has explored revising the class and subclass definitions, this has been done in the context of mediation and related settlement negotiations. It is premature to disclose that material as it is not relevant to the class definition that will be used for litigation purposes.

Class Plaintiffs' Position on Amending the Class Definition

A. Defendants have not articulated a basis for the relief sought in their original motion, as required by LR. 7.1(a)(2)(A), as it applies to the newly-pled class definitions in the Fourth Amended Complaint.

The parties met and conferred on May 28, 2019. During a teleconference, Interim Class Counsel observed that Defendants' initial Motion to Strike the Class Definition sought to strike the class as defined in Class Plaintiffs' Consolidated Amended Complaint (Dkt. 238) and inquired as to whether it was Defendants' position that the Motion also applied to the now-operative class definitions in Class Plaintiffs' Fourth Amended Complaint ("Fourth Amended Complaint"). Veolia's Motion to Strike, filed in December 2017, proposed to strike the class allegations of Plaintiffs' Consolidated Amended Complaint. *See* Dkt. 275, p.1 (referencing the proposed classes as defined in Dkt. 238, ¶¶ 311-12.) Since that motion, Plaintiffs have presented new proposed class definitions as set forth in the 4AC, Dkt.620-3, Ex. A, ¶¶452-455. Counsel for Veolia indicated that a revised motion had been filed applying Defendants' arguments to the new proposed classes in the Fourth Amended Complaint. At that point, the parties agreed to suspend the meet and confer until May 31, 2019.

During the meet and confer process on May 31, Defense counsel confirmed that they were mistaken and that an Amended Motion had not been filed. Consequently, Interim Class Counsel asked whether Defendants continued to

believe that the class as defined in the operative complaint should be struck and, if so, inquired what the basis was for applying Defendants' arguments (and in particular, the "failsafe class" arguments) presented in Defendants' original Motion to the newly-pled class definitions in the Fourth Amended Complaint. Counsel for Veolia declined to articulate a basis. Interim Class Counsel believe that it would be inefficient to amend the class definitions further at this time without knowing the basis for any challenge to the revised definitions in the Fourth Amended Complaint. Further, Plaintiffs are entitled to know the basis for the Defendant's requested relief as it applies to the newly-pled class definitions in the Fourth Amended Complaint, pursuant to Local Rule 7.1(a)(2)(A), and such information should be conveyed *before* determining a schedule for proposal of new class definitions.

B. If a deadline for submission of proposed new class definitions needs to be established now, the date should be March 2, 2020.

As the Court is aware, the parties have devoted considerable time towards establishing the schedule for this litigation, culminating in the Court's issuance of the Case Management Order, Dkt. 827. At no time during this process did Veolia, or any other Defendant, propose the establishment of a deadline for the amendment of class definitions. And for good reason. As set forth in Class Plaintiffs' earlier Response to Veolia's Motion, class definitions are frequently amended when the

motion for class certification is presented to: 1. create subclasses associated with separate species of injury; and 2. revise class definitions to better utilize objective criteria upon which a motion to certify will be based, as informed by the discovery process. *See* Dkt. 380, pp. 3-8.

Indeed, even if Class Plaintiffs were to amend the class definitions now, it is certainly possible they would need to be amended again, later, as informed by the fact discovery process. Because case law supports the evaluation of proposed class definitions *following* fact discovery[4], Class Plaintiffs respectfully submit that any

[4] *See, e.g., In re Am. Med. Sys., 75 F. 3d 1069,186(6th Cir. 1996)*(" The court should defer decision on certification pending discovery if the existing record is inadequate for resolving the relevant issues.") ***Shipp v. Norton Outdoor Advertising, Inc.*** Case No. 1:18-cv-444, 2019 WL 188047 at *4(S.D. Ohio, January 14, 2019) ("Many courts have stressed the need for caution when evaluating class action allegations prior to any discovery, "because class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.") ***Progressive Health & Rehab Corp., v. Quinn Medical, Inc.*** 323 F.R.D. 242, 247(S.D. Ohio 2017)(" to strike the class allegations at this juncture would be inconsistent with the type of "rigorous analysis" that this Court would endeavor to undertake in deciding whether to ultimately certify a class." Fact discovery allowed to proceed.). Class Plaintiffs envision that they may propose subclasses to reflect information learned in discovery. To require that Class Plaintiffs propose such subclasses now, without the benefit of fact discovery to determine, for example the relevant exposure periods as it relates to property damage, Legionella, lead, and possibly other contaminants in Flint water, deprives Class Plaintiffs of the opportunity to develop the factual record upon which such subclasses would be predicated. *See*, Dkt. 380, pp.3-8. *Pullen v. McDonald's Corp.*, No. 14-11081, 2015 WL 10527631 (E.D. Mich. Aug. 17, 2015) (denying motion where "almost no discovery has yet been taken": "the court will let the parties to proceed with discovery, allowing for the possibility that a subclass of plaintiffs may arise from the originally-proposed classes."); s*ee also* Dkt. 380, pp. 3-8.

deadline for amending the proposed class definitions should be coterminous with the deadline to file a motion for class certification, which is currently set at March 2, 2020. Case Management Order, Dkt. 827, p. 21.

Dated: June 7, 2019

Respectfully submitted,

/s/ Theodore J. Leopold
Theodore J. Leopold
COHEN MILSTEIN SELLERS & TOLL PLLC
2925 PGA Boulevard
Suite 220
Palm Beach Gardens, FL 33410
(561) 515-1400 Telephone
tleopold@cohenmilstein.com

Kit A. Pierson
Joseph M. Sellers
Emmy L. Levens
Jessica B. Weiner
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW
Suite 500
Washington, DC 20005
(202) 408-4600 Telephone
kpierson@cohenmilstein.com
jsellers@cohenmilstein.com
elevens@cohenmilstein.com
jweiner@cohenmilstein.com

Vineet Bhatia
Shawn Raymond
SUSMAN GODFREY, L.L.P.
1000 Louisiana Street

/s/ Michael L. Pitt
Michael L. Pitt
Cary S. McGehee
PITT MCGEHEE PALMER & RIVERS, P.C.
117 West 4th Street
Suite 200
Royal Oak, MI 48067
(248) 398-9800 Telephone
mpitt@pittlawpc.com
cmcgehee@pittlawpc.com

Paul Novak (P39524)
Diana Gjonaj (P74637)
Gregory Stamatopoulos (P74199)
WEITZ & LUXENBERG, P.C.
3011 West Grand Boulevard
Suite 2150
Detroit, MI 48226
(313) 800-4170 Telephone
pnovak@weitzlux.com
dgjonaj@weitzlux.com
gstamatopoulos@weitzlux.com

Robin L. Greenwald
WEITZ & LUXENBERG, P.C.
700 Broadway
New York, NY 10003
(212) 558-5500 Telephone

Suite 5100
Houston, TX 77002
(713) 651-3666 Telephone
vbhatia@susmangodfrey.com
sraymond@susmangodfrey.com

Stephen Morrissey
Jordan Connors
SUSMAN GODFREY, L.L.P.
1201 Third Ave.
Suite 3800
Seattle, WA 98101
(206) 516-3880 Telephone
smorrissey@susmangodfrey.com
jconnors@susmangodfrey.com

Peretz Bronstein
Shimon Yiftach
BRONSTEIN, GEWIRTZ & GROSSMAN, LLC
60 East 42nd Street
Suite 4600
New York, NY 10165
(212) 697-6484 Telephone
peretz@bgandg.com
shimony@bgandg.com

rgreenwald@weitzlux.com

Esther E. Berezofsky
MOTLEY RICE LLC
210 Lake Drive East
Suite 101
Cherry Hill, NJ 08002
(856) 667-0500 Telephone
eberezofsky@motleyrice.com

Teresa Caine Bingman (P56807)
THE LAW OFFICES OF TERESA A. BINGMAN, PLLC
4131 Okemos Road
Suite 12
Okemos, MI 48864
(877) 957-7077 Telephone
tbingman@tbingmanlaw.com

William Goodman (P14173) Julie H. Hurwitz (P34720) Kathryn Bruner James (P71374)
GOODMAN & HURWITZ PC
1394 E. Jefferson Ave.
Detroit, MI 48207
(313) 567-6170 Telephone
bgoodman@goodmanhurwitz.com
jhurwitz@goodmanhurwitz.com

Bradford M. Berry
Anson C. Asaka
NAACP
4805 Mt. Hope Dr.
Baltimore, MD 21215
(410) 580-5777 Telephone
bberry@naacpnet.org
aasaka@naacpnet.org

Deborah A. LaBelle (P31595)
LAW OFFICES OF DEBORAH A. LABELLE
221 N. Main St.
Suite 300
Ann Arbor, MI 48104 (734)
996-5620 Telephone
deblabelle@aol.com

Kathryn P. Hoek
SUSMAN GODFREY, L.L.P.
1901 Avenue of the Stars
Suite 950
Los Angeles, CA 90067
(310) 789-3100 Telephone
khoek@susmangodfrey.com

Neal H. Weinfield
THE DEDENDUM GROUP
(312) 613-0800 Telephone
nhw@dedendumgroup.com
Cirilo Martinez (P65074)
LAW OFFICE OF CIRILO MARTINEZ, PLLC
3010 Lovers Lane
Kalamazoo, MI 49001
(269) 342-1112 Telephone
martinez_cirilo@hotmail.com

David J. Shea
SHEA AIELLO, PLLC
26100 American Drive
2nd Floor
Southfield, MI 48034
(248) 354-0224 Telephone
david.shea@sadplaw.com

Trachelle C. Young (P63330)
TRACHELLE C. YOUNG & ASSOCIATES PLLC
2501 N. Saginaw St.
Flint, MI 48505
(810) 239-6302 Telephone
trachelleyoung@gmail.com

Brian McKeen (P34123)
Claire Vergara (P77654)
McKEEN & ASSOCIATES, PC
645 Griswold Street
Suite 4200
Detroit, MI 48226
(313) 961-4400 Telephone
bjmckeen@mckeenassociates.com
cvergara@mckeenassociates.com

Cynthia M. Lindsey (P37575)
Shermane T. Sealey (P32851)
CYNTHIA M. LINDSEY & ASSOCIATES, PLLC
8900 E. Jefferson Avenue
Suite 612
Detroit, MI 48214
(248) 766-0797 Telephone
cynthia@cmlindseylaw.com
shermane@cmlindseylaw.com

Mark L. McAlpine (P35583)
Jayson E. Blake (P56128)
MCALPINE PC
3201 University Drive
Suite 100
Auburn Hills, MI 48326
(248) 373-3700 Telephone
mlmcalpine@mcalpinelawfirm.com
jeblake@mcalpinelawfirm.com

Andrew P. Abood (P43366)
ABOOD LAW FIRM
246 East Saginaw Street
Suite One
East Lansing, Michigan 48823
(517) 332-5900 Telephone
andrew@aboodlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2019, I caused **Class Plaintiffs' Notice Regarding Deadline for Proposal of Revised Class Definitions** to be electronically filed with the Clerk of the Court using the Court's electronic submission system. Notice of the filing was sent to all parties by operation of the Court's electronic filing system. I declare the above statement is true and to the best of my knowledge, information and belief.

Dated: June 7, 2019 */s/ Paul F. Novak*